REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI
CORAM: GICHERU, OMOLO & LAKHA, JJ.A.
CRIMINAL APPEAL NO. 57 OF 1991
BETWEEN

DUNCAN WAHOME WAMAE .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Porter & Mwera, JJ.) dated 31st May, 1991

in

H.C.CR.A. NO. 350 OF 1987)

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JUDGMENT OF THE COURT

On the 18th March, 1987, Duncan Wahome Wamae, the appellant, was convicted by the then Nyeri Principal Magistrate, Omondi Tunya, Esq. on two counts of robbery with violence contrary to section 296 (2) of the Penal Code and following upon the two convictions, the appellant was sentenced to suffer death in the manner authorised by law.The particulars of the charges upon which the appellant was convicted had stated that during the evening of 16th February, 1985 at about 8.30 p.m. at Oltarakwai Farm, Naro-Moru, in Nyeri District, the appellant jointly with others not before the court robbed John Robert McReady (count one) and Ann McReady (count two) of various sums of money and other items and that at or immediately before or immediately after the time of such robbery, the appellant and his confederates had used personal violence on the McReadys. It was common ground that during the robbery, Mr. McReady was done to death by his attackers. Mr. Kiage, who ably argued the appellant's appeal before us, objected to the reference by the superior court of the deceased McReady having been killed at his retirement home in Naro-Moru after many years of judicial service and Mr. Kiage's objection was on the basis that there was no evidence on record to show what Mr. McReady had been before he was done to death. Our answer to that objection is that it is a fact that Mr. McReady had a long and distinguished, if somewhat controversial, service in the Kenya Judiciary and no evidence was needed to prove that, assuming it was necessary to prove it. Following upon his convictions and the sentence of death imposed upon him by the magistrate, the appellant appealed to the High Court, and on the 31st May, 1991, the High Court (Porter and Mwera, JJ.) dismissed the appellant's appeal and confirmed the conviction and sentence imposed upon him. The appellant appeals to this Court a second time and that being so, only matters of law fall for our consideration and determination.

The trial magistrate's conviction of the appellant had been on the basis that following the robbery in

the McReady's home on the 16th February, 1985,police had visited the home of one Ngatia on the 23rd February, 1985 and during that visit, Ngatia had engaged the police party in a fierce gun-battle during which Ngatia himself was fatally wounded.The police recovered the pistol which had been stolen from McReady during the robbery and it was the evidence of the police officers such as P.W.9 that before Ngatia died, he had named this appellant and another person as having been with him during the robbery at the home of the McReadys. The magistrate accepted this evidence as correct, treated it as a dying declaration by Ngatia and then purported to use the dying declaration as being corroborative of an inquiry statement allegedly made by the appellant to Inspector Harrison Wahogo (P.W.23). The High Court, of course rejected this approach and rightly in our view. In the circumstances of the case, what Ngatia had told witnesses such as P.W.9 could not possibly amount to a dying declaration under section 33 of the Evidence Act. As the learned Judges of the High Court correctly pointed out the issue of who or what had caused the injuries of which Ngatia had died was not a subject of inquiry before the magistrate.

Had Ngatia survived his injuries, it is certain he would have faced a joint charge with the appellant and what he had said respecting the appellant and others would have simply been evidence of a co-accused which even if sworn can only amount to evidence of the weakest character and can only be used to lend credence to other independent evidence - see ***GOPA S/O GIDAMEBANYA & OTHERS V R, (1953) 20 EACA, 318*** . But even if what Ngatia had told the police party were to be treated as amounting to a dying declaration, which it did not, it could not have been used to found corroboration for the inquiry statement of the appellant as the learned magistrate had purported to do. Of course there is no law which would bar a court from acting on an uncorroborated dying declaration, but as a matter of practice and it is now a very old practice, courts have invariably looked for corroborative evidence where a conviction is to be founded upon a dying declaration - see ***OKETHI OKALE V R [1965] EA 555*** . If a dying declaration itself requires corroboration, it [the dying declaration] could not be used to corroborate the retracted inquiry statement which the appellant was said to have made to P.W.23. With respect to the learned Judges of the High Court, they correctly rejected the approach which the trial magistrate had adopted.

If what Ngatia allegedly told the police party was to be rejected and was rightly rejected, what the prosecution were left with was that on information received, they arrested this appellant on the 6th March, 1985. The appellant was actually arrested by Senior Sergeant of police Gilbert Amolo (P.W.14) who was then attached to Divisional CID headquarters, Nakuru.

That officer testified as follows:-

> ***"... On 6.3.85 during day time, I was in the office when I received information that a suspect in the murder case of the late Robert McReady had been spotted within Majonge area in Nanyuki town and he was known as Joseph Wamae. I accompa nied some policemen to the area. He was described as short, brown and with a finger missing. We patrolled the area in question but failed to trace the suspect. We took back the station landrover and started patrolling on foot.***
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> ***After going past Nyakio B ar, I saw a man who answered the description given. He was carrying a brown paper bag. I followed him and caught up with him at a shop where he was drinking soda. I now see him in court in the dock (accused identified). I identified myself to him as a police officer and informed him I held him under arrest for questioning. One of his fingers was missing.***
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> ***Assisted by the other officers we took him to the landrover where he told us his names as Joseph Wamae. He was required in Nyeri Division area so I contacted Nyeri who collected him from our station. I handed him to I.P. Wahogo of Nyeri Division CID."***

The evidence of witnesses such as P.W.9 regarding what Ngatia was alleged to have told them having been excluded and rejected as being irrelevant and of no value, the evidence of P.W.14 above would be the first thing touching upon the appellant. P.W.14, as is recorded above, specifically stated that he handed over the appellant to Inspector Wahogo (P.W.23). P.W.23 did not state the time he left Nyeri to

go to Nanyuki and back to Nyeri but his evidence was that he arrived back at Nyeri at about 11 p.m. P.W.23 was the investigating officer. His evidence was that he told the appellant that he, P.W.23, was investigating the circumstances in which the late Mr. McReady had been killed, that he informed the appellant that he (P.W.23) believed that the appellant had some useful information which would assist him (P.W.23) in his investigations and that having cautioned the appellant that he (appellant) was not obliged to tell him anything but that anything he (appellant) said would be taken down in writing and may be given in evidence, the appellant himself voluntarily chose to record a statement which he did in his own hand and in his language of the Gikuyu. The appellant, while admitting that he wrote a statement, countered by saying that he only did so after P.W.23 and other police officers had shown to him the photograph of a dead man, showed him guns and threatened him that unless he made a statement he too would go the way of the dead man in the photograph. To determine the voluntariness or otherwise of the alleged statement, the trial magistrate held a trial within the trial and at the end of it, he came to the conclusion that the statement was voluntarily made. The appellant had produced a hospital card during the trial within trial, his contention being that the card contained the injuries inflicted on him when pressure was being exerted on him by police officers to induce him to make a statement. In his ruling admitting the statement into the evidence as having been voluntarily made, the magistrate stated, and we quote him:-

> ***"I have considered the respective evidence of both P.W.1 [P.W.23] and the accused in the trial within trial and I am satisfie d the statement by the accused now in question was made by him and it was voluntarily made. In my judgment I will comment further on the medical card -D Exh. A - produced by the accused person. The statement may now be used in evidence.***
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> ***I so order."***

In his judgment, the magistrate wholly failed to make any further comments on the medical card produced by the appellant and in arguing the appeal before us, Mr. Kiage contended that the learned trial magistrate did not give any reason(s) for his ruling that the appellant made the statement voluntarily. There is no doubt that Mr. Kiage is correct in this contention but as we said at the beginning of this judgment, this is a second appeal to the Court, the High Court also having dealt with the matter. The High Court definitely dealt with the issue of the voluntariness or otherwise of the statement and that court also came to the conclusion that the statement was voluntary. It would, of course, have been very helpful to the High Court if the trial magistrate had made his "further comments" on the hospital card, but his failure to do so notwithstanding, it is not to be forgotten that the High Court, as the first appellate court was entitled, indeed it was duty-bound to:-

> ***"... reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld." - See OKENO V REP [1972] EA 32.***

Having done so, the High Court Judges were satisfied that the appellant had voluntarily made the statement in dispute.

Whether a statement is or is not voluntary is really a question of fact, not law. As we have seen in the ruling of the trial magistrate which we have reproduced in full, the magistrate had no doubt that the appellant's statement was voluntary. He reserved his comments with respect to the medical card produced by the appellant and in the end, he failed to make those further comments. The High Court, on appeal exhaustively dealt with the circumstances under which the statement was made. They noted that the appellant made the statement on the very same day of his arrest and that the appellant himself wrote down the same in his own hand and in his mother-tongue. On the medical card produced by the appellant, the only relevant issue appears to have been that it showed the appellant had some injuries on his legs. But we also note that the record shows that when the appellant was arrested, he had a wound on one of his legs. When crossexamined by the prosecutor during the trial-within-trial, the appellant admitted and we quote him:-

"I admit at the time of arrest I already had a wound in (sic) my left leg ....."

Clearly, there was reasonable evidence from which the trial court and the first appellate court could properly conclude and did conclude that the appellant's statement under inquiry to P.W.23 was voluntarily made. There cannot be any lawful basis for this court to interfere with that conclusion. It cannot be said that the conclusion was based on no evidence or that it was based on insufficient evidence.

The other point taken by Mr. Kiage on behalf of the appellant was that P.W.23, being the investigating officer in the case, was not entitled to take any sort of statement at all from the appellant and for that proposition Mr. Kiage relied on this Court's oft cited decision in the case of ***JOSEPH NJARAMBA KARURA V REPUBLIC (1982 -88) 1 KAR 1165 . In KARURA'S*** case, the Court purported to lay it down that:-

> ***"An investigating officer should not record a confession statement by an accused person so as to avoid any charges of tailoring evidence to support the prosecution case and allegations of use of force upon the accused to extract the confession. The normal practice is for the statement to be recorded by another officer who would later produce it in evidence."***

The case has been repeatedly cited to this Court for the proposition that an investigating officer ought not to record any sort of statement, whether under inquiry or under a charge and caution. The Court recently dealt with the matter in the case of JOSEPH JUMA MBORI V REPUBLIC, Criminal Appeal No. 6 of 1992 (Unreported) and the Court quoted a passage from the case of BASSAN & WATHIOBA V REG [1960] EA 521 as follows:-

> ***"We certainly do not think that the court in NJUGUNA'S case intended to lay down a rule of law that a statement recorded by an investigating officer upon a charge and caution of a suspect is to be automatically excluded from evidence. Nor do we think that the court in ISRAEL'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.***
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> ***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."***

Having quoted this passage, the Court in MBORI'S case , went on to deliver itself as follows:-

> ***"With respect, we agr ee with the above passage. It would not be practicable in all circumstances to get another 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 t he crime and there is nothing wrong when he records a voluntarily made statement after having given the proper caution.***
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> ***With respect what this Court said in this regard in the KARURA case were per incuriam. It is certainly true to say that once an invest igating 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 s tated by Lord Sumner in his judgment in the Privy Council in IBRAHIM V REX (referred to in the case of R V VOISIN (1918) 1 K.B. 531 at page 537 and we quote: -***
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> ***`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 p erson in authority.'."

The remarks in **MBORI'S** case were made by this Court on the 22nd May, 1998. The remarks show the current thinking of the court as respects the views expressed in KARURA's case and it is clear that the views in KARURA's case were made per incuriam. We can add nothing to that position in this appeal.

Accordingly we now find and hold that not only was the inquiry statement of the applicant voluntarily made and recorded by him but that the same was properly taken by P.W.23.

The statement was, however, retracted by the appellant and as such it required corroboration. As we have already stated, the magistrate's approach on the issue of corroboration was clearly wrong, but once again, the High Court went into the issue of corroboration and they found such corroboration in the evidence of P.W.11 that on the 7th March, 1985, the appellant voluntarily led them to the home of the McReadys', and in the process showed them the route through the bush which they had taken to the home and that the appellant pointed out to them various places in the home and outside where he and his confederates had been to. The appellant for his part contended that he was forced to do all these things by the police and looking at the matter broadly, all these allegations by the prosecution formed part of what can only qualify as part of the alleged confession by the appellant. Looked at in that light those matters also required corroboration just as much as the written confession.

The Judges of the High Court were of the view that the conduct of the appellant in pointing out to the police various places in the manner alleged amounted to corroboration of the appellant's statement under inquiry, but we do not quite appreciate this argument. As we have pointed out, the appellant was saying that the police had compelled him to point out the places he did point out, and that being so, such evidence itself required corroboration. However, we are satisfied that there was in fact corroboration of this evidence in the evidence of Ndirangu Karanja Ndegwa (P.W.18) who also testified that on the 8th March, 1985 the appellant voluntarily pointed out to them the spot in the forest where the body of P.W.18's son had been buried. The High Court also found as a fact that the evidence of P.W.18 was corroborative of the police evidence that the appellant was not in any way compelled to point out to the police the various spots which the police witnesses said he pointed out to them. Once again whether the pointing out of the sites by the appellant was or was not voluntary was an issue of fact and on its independent re-evaluation and re-assessment of the evidence, the High Court concluded that it was voluntary. Clearly there was evidence on record upon which such a conclusion could be made and the High Court did make it rightly in our view. In the circumstances, there cannot be any reason for us to interfere with that conclusion.

We have not dealt individually with the grounds of appeal which were preferred by the appellant and argued before us.We trust that each one of them has found its place in this judgment. Like the two courts below, we are satisfied that the two charges of robbery upon which the appellant was convicted and sentenced were proved beyond any reasonable doubt and the convictions were right. We only need to add that Mr. Bwonwonga for the Republic supported the convictions.

We accordingly dismiss the appeal against the convictions.

The magistrate sentenced the appellant to death on each of the two counts but we cannot see how the appellant can be hanged twice over. We think the proper order to impose in such circumstances is to impose the penalty on the first count and leave the second count in abeyance. Accordingly we set aside the sentence of death imposed on count two and impose no penalty on that count. We however, retain and confirm the sentence of death imposed on count one.

Dated and delivered at Nairobi this 17th day of July, 1998.

J. E. GICHERU

JUDGE OF APPEAL

R. S. C. OMOLO

JUDGE OF APPEAL

A. A. LAKHA

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR