IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU, KWACH & SHAH, JJ A)

CRIMINAL APPEAL NO 97 OF 1990

BETWEEN

JOHN MWANZIA MUSEMBI ……APPELLANT

AND

REPUBLIC ……..RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Justice E. Torgbor) dated 14th June, 1990)

in

CRIMINAL CASE NO. 25 OF 1988

JUDGMENT

John Mwanzia Musembi (the appellant) was arraigned on two counts of murder contrary to section 204 read together with section 203 of the Penal Code. The first count alleged that on 8th November, 1987 at Kingoti village in Machakos District, Eastern Province, he murdered Moses Kinyanjui Makumi. In the second count he was charged with the murder of Philip Muisyo Musembi on 11th November 1987 at Matakutha trading center also in Machakos District.

The deceased in the first count was shot and killed in his house at night by robbers who then escaped. His wife saw the attackers but she could not identify them. The deceased in the second count was in fact the appellant's brother who was accidentally shot by the appellant on 11th November, 1987 when they raided Plainsview Bar at Matakutha trading center. The body of the appellant's brother was found by the police the next day lying in a nearby field.

At the end of a full trial, the appellant was convicted of murder on the first count and sentenced to death. On the second count he was convicted of manslaughter but in accordance with practice, sentence was deferred. On this count, the necessary intent to murder could not be established because the victim was a member of the gang of robbers and one could say was killed by a stray bullet.

The appellant has appealed against his conviction on 13 grounds which can e reduced to two. The main ground is that the Judge erred in law in failing to allow evidence to be led in the presence of the assessors

regarding the manner in which the appellant's extra-judicial statement had been obtained. After he had ruled it inadmissible in a trial within a trial, which omission, it is contended on behalf of the appellant, was fatal to the prosecution case. The other ground upon which the conviction is challenged is that the Judge should have rejected the confession as there was evidence that it had been obtained by threats and torture.

We consider the first main ground of appeal regarding the admission of the appellant's statement under inquiry. On 17th November, 1987, the appellant made a long and detailed statement to Chief Inspector Julius Kitonyi Wambua in which he explained how he and his brother had stole the murder weapon at Githima Camp in Isiolo for the specific purpose of committing robberies. He explained how he had shot and killed Makumi in his house on 8th November, 1987 and how they had opened fire at random in Plainsview Bar at Matakutha trading center on the night of 11th November, 1987 and in the confusion he killed his own brother. He had also led the police to a pit latrine where some live ammunition and personal items belonging to his deceased brother were recovered. He also led the police to a house in Nairobi where the bag he and his deceased brother had used to convey the rifle from Isiolo to Kangundo was also recovered.

The admissibility of this statement, which amounted to a confession, was challenged by counsel for the appellant on the ground that it had been obtained by torture and threats. The Judge conducted a trial within a trial within a trial in the absence of the assessors. According to the appellant, he was assaulted by the police and suffered injuries to his penis and lost two teeth on the left upper jaw. He claimed that he was forced to sign the statement against his will. He admitted that although he was taken to Machakos Hospital on 23rd November, 1987, to be examined, he did not complain to the doctor who saw him about the alleged injuries nor did he ask for any treatment in connection therewith. No injuries were recorded by the doctor in the P3 Form which he completed and signed after the examination of the appellant. The allegations of torture and threats were denied by the police. In his ruling, the Judge disbelieved the appellant's allegation of torture and threats and he held that the appellant had made the statement voluntarily. He noted that the statement was long and contained such details that only a person who had direct knowledge of the events that it contained could have related.

The assessors were then recalled and from the record of proceedings, Chief Inspector Julius Kitonyi Wambua produced his statement and read it to the court and he also produced exhibits. He was cross-examined by the defence counsel on other matters but not on the allegations of threats and torture of which the appellant had complained in the trial within a trial in an attempt to exclude his extra-judicial statement. The Judge did not bring these allegations to the attention of the assessors nor did he remind the defence counsel to revisit the challenge by cross-examination in the presence of the assessors. The result was that the assessors knew nothing at all about the appellant's allegations of torture and threats and returned their verdicts on both counts without considering the fact that the appellant had retracted his extra-judicial statement.

Mr. Ochieng, for the appellant, submitted that the failure by the Judge to bring that evidence to the attention of the assessors was a material irregularity which is incurable because the assessors returned the verdict without having heard all the evidence, and in particular, the claim by the appellant that the alleged confession had been extracted by threats and torture.

The procedure to be followed where any extra-judicial statement is admitted after a trial within a trial, in a trial with assessors, was set out by the Court of Appeal for Eastern Africa in the well known case of Kinyori s/o Karuditu v Reginam (1956) 23 EACA 480 at page 482:

> "For the avoidance of doubt we now summarise the proper procedure at a trial with assessors when the defence desires to dispute the admissibility of any extra-judicial statement, or part thereof, made by the accused either in writing or orally. If the defence is aware before the commencement of the trial that such an issue will arise the prosecution should then be informed of that fact. The latter will therefore refrain from referring in the presence of the assessors to the statement concerned, or even to the allegation that any such statement was made, unless and until it ahs been ruled admissible. When the stage is reached at which the issue must be tried the defence should mention to the court

that a point of law arises and submit that the assessors be asked to retire. It is important that that should be done before any witness is allowed to testify in any respect which might suggest to the assessors that the accused had made the extra-judicial statement. For example, an interpreter who acted as such at the alleged making of the statement should not enter the witness box until after the assessors have retired. The assessors having left the court the Crown, upon whom the burden rests of proving the statement to be admissible, will call its witness, followed by any evidence or statement from the dock which the defence elects to tender or make. The Judge having then delivered his ruling, the assessors will return. If the statement has been held to be admissible the Crown witness to whom it was made will then produce it and put it in if it is in writing, or will testify as to what was said if it as oral. The defence will be entitled, and the Judge should make sure that the defence is aware of its right, again to cross-examine that crown witness as to the circumstances in which the statement was made and to have recalled for similar cross-examination the interpreter and any other Crown Witness who has given evidence on the issue in the absence of the assessors. Both in the absence and again in the presence of the assessors the normal right to re-examine will arise out of any such cross-examination. When the time comes for the defence to present its case on the general issue, if the accused elects either to testify or to make a statement from the dock thereon he will be entitled also to speak again to any questionable circumstances which he alleges attended the making of his extra-judicial statement and to affirm or to reaffirm any repudiation or retraction upon which he seeks to rely. Indeed, if the accused desires to be heard in his defence either in the witness box or from the dock he will not be obliged to testify in chief or to speak, as the case may be, to anything more than the matters touching on the issue of admissibility; but, once he elects to testify, however much he then restricts his evidence-in-chief he will be liable to cross-examination not only to credit but also at large upon every matter in issue at the trial. The accused will also be entitled to recall and again to examine any witnesses of his who spoke to the issue in the assessor's absence, and to examine any other defence witness thereon."

The Court in Kinyori s/o Karuditu's case explained that the broad principle underlying that procedure is that the accused entitled to present, not merely to the Judge but also to the assessors, the whole of his case relating to the alleged extra-judicial statement; for the Judge's ruling that it is admissible in evidence is not the end of the matter; it still remains for both Judge and assessors individually to assess the value or weight to be attached to any admission or confession thereby disclosed and also the accused is still at liberty to try to persuade them that he has good reason to retract or repudiate the statement concerned or any part of it. Both the procedure and principle enunciated in this case was subsequently endorsed and applied by the Court of Appeal for East Africa in the case of Rashiidi & Another v Republic, (1969) EA, an appeal from a decision of the High Court of Tanzania. In both these cases although the correct procedures had not been followed the convictions were nevertheless upheld because the omission had not occasioned a failure of justice.

Mr. Metho did not deny that the procedure laid down in Kinyori s/o Karuditu's case is obligatory except to submit that there had been a partial compliance with it at the appellant's trial. He had in mind the introductory remarks made by Chief Inspector Julius Kitonyi Wambua before the defence counsel raised his objection to the statement. That there was a breach of the procedure on this case cannot be gainsaid. What we have to decide is whether this omission would justify this Court's interference with the appellant's conviction as has been strongly urged by counsel. We do not think that it does because in out opinion that breach is cured by section 382 of the Criminal Procedure Code and the error has not occasioned a failure of justice. Apart from the confession there was ample and overwhelming evidence to support the appellant's conviction.

On 16th November, 1987, a day before the appellant made his statement, he had led the Chief Inspector Julius Kitonyi Wambua and Corporal Mutua of Kangundo Police Station to Kilala River and pointed to a part of the river where he said he had thrown the murder weapon. The police got into the river at that particular point and recovered a G3 rifle S.N. 6900357, which according to the evidence of A.C.P. Benson Muchoki Nduguga, a firearm examiner, was the weapon from which the spent cartridges collected from the two scenes of crime and examined by him were fired. This was the same rifle which had been issued to P.C. Lazarus Kioko of the Anti-Stock Theft Unit at Githima Camp in Isiolo and which was stolen from his tent at night on 1st November, 1987. He duly reported its loss to his Corporal the

following day.

On the other hand, treating the confession as retracted which would then require corroboration, this is to be found in the events described in the statement by the appellant which led to the recovery of various objects which directly connect the appellant with both murders. We have already mentioned the rifle recovered in Kilala River. The appellant had also led the police to Githima Camp and showed them how he and his brother had stolen the murder weapon from Corporal Kioko's tent. He had also led the police to a pit latrine where he said he had discarded unused ammunition and certain personal items belonging to his deceased brother. Upon search these items were recovered which included unused ammunition and certain personal items belonging to his deceased brother. Upon search, these items were recovered which included unused ammunition and an ID card belonging to his brother. The red bag in which the appellant told the police he had used to house in Nairobi to which he had led the police. The appellant's claim that he had been assaulted by the police in order to extract the statement must be untrue because he did not complain to the doctor who examined him barely six days after the alleged assault and no injuries of any kind were noted by the doctor in the P3 Form. If indeed he had sustained any injuries in the hands of the police, the wounds would have still been fresh by the time he was seen by the doctor. In these circumstances, there can be no doubt at all that the appellant's statement was true and made voluntarily.

Mr. Ochieng cited the case of Ndagizimana & Another v Uganda, (1967) E.A. 35, where the Court of Appeal for East Africa allowed the appeal of one appellant and quashed his conviction for murder because of breach of procedure in the reception of his disputed extra-judicial statement. That was right because in the case of that particular appellant, there was no other evidence against him except the disputed confession and the evidence given by the first appellant at the trial. In the case of the first appellant, whose appeal was dismissed, the Court found that the omission had not occasioned any injustice as the court would have in any event convicted him. Mr. Ochieng also relied on the case of Joseph Kabui v Reginam, (1954) 21 EACA 260. But again that case deals with a situation where an assessor who had been absent during the proceedings had been allowed to return and give his verdict. The trial was declared to be nullity. That is not the case here.

We can deal with the other ground of appeal very briefly. The appellant's confession was properly admitted and acted upon by the Judge because clearly there was no credible evidence that the appellant had been tortured or assaulted by the police. The scars on his penis which he showed the Judge and the gap in his jaw could not reasonably be attributed to any assault upon him by the police having failed to raise them with the doctor at the earliest possible opportunity. Secondly, even if the confession is treated as retracted, we have already said there is sufficient corroborative evidence for it to sustain a conviction.

We are satisfied that the appellant was properly convicted and we can find no substance whatsoever in any of the grounds urged on his behalf. Consequently, his appeal fails and is dismissed.

Dated and delivered at Nairobi this 11th day of May, 1995.

J.E. GICHERU

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JUDGE OF APPEAL

R.O. KWACH

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL