IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GACHUHI, OMOLO & LAKHA, JJ A)

CRIMINAL APPEAL NO 70 OF 1990

Between

MOHAMED SHIRAZ HUSSEIN……………APPELLANT

AND

REPUBLIC……………………...............……..RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nairobi (Justice F.E. Abdullah) dated 25th May, 1990

in

H.C.C.R.A NO 54 of 1986

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JUDGMENT OF THE COURT

Mohamed Shiraz Hussein, hereinafter "the appellant" appeals to this court against his conviction on a charge of murder which conviction was recorded against him by the late Abdullah, J on 25th May, 1990. The appellant had been tried before that learned Judge sitting in Nairobi with the aid of assessors on an information that had alleged that on 5th December, 1987 at Pangani in Nairobi, the appellant murdered Zainab Essah Shiraz, hereinafter "the deceased", consequent upon the convictor the appellant was sentenced to death as is mandatorily required by law and he appeals to the Court upon six grounds, namely that:-

1. The learned Judge erred in convicting him of the offence of murder in the absence of any evidence establishing malice aforethought on the part of the appellant:
2. The learned Judge erred in convicting the appellant on retracted and / or repudiated confessions without due corroboration of such statement by other independent evidence:
3. The learned Judge erred in convicting the appellant or circumstantial evidence which was wholly unreliable, unreasonable and generally weak
4. The learned Judge erred in relying on circumstantial evidence which was not corroborated and in the presence of other contesting and strong evidence which was compatible with the innocence of the appellants.
5. The learned Judge misled the assessors in his summing-up by indicating that the law required no corroboration on retracted and repudiated confessions.And

6. The learned Judge's conviction was not based on reasoning and findings which were backed by direct and concrete evidence but on evidence whose effect was to place the burden of proof on the appellant.

Mr Kivuitu who argued the appellants appeal before us did not argue each ground separately but covered them all in his submissions before the court. Mr Etyang, the Deputy Public Prosecutor on behalf of the Republic argued grounds 4 and 5 together, then the other grounds separately. We are grateful to both Mr Kivuitu and Mr Etyang for their very able submissions before us.

This being a first appeal to us, the appellant is entitled to expect of the Court that it must reconsider the evidence led during the trial, evaluate that evidence itself, and draw its own conclusions in deciding whether the judgment of the High Court should be upheld. See Okeno v Republic (1972) EA 32.

The deceased was the wife of the appellant. They were married in 1983 and there were two children of the marriage, one born in 1984 and the other one in 1985. The child born in 1985 had, in effect been given to a childless relative of the deceased who lived with the boy in Mombasa. The appellant and the deceased lived with the first born boy in a flat in Pangani, Nairobi. It was either agreed or was conclusively proved by the prosecution that on 5th December, 1987, the appellant, the deceased and their son left their house at Pangani at about 11.30 a.m. The deceased to take the boy to the deceased's family who lived at Eastleigh Section III, Nairobi. The father of the deceased, Isaak Yusuf Zenner (P.W. 13) and his other daughter Khaisunnisa Isaak (P.W.12) both told the judge and the assessors that the appellant and the deceased left them with the boy at about 11.30 a.m. on that day and that the appellant and the deceased were going shopping. The appellant alone returned to the house to collect the boy and according to P.W. 12 in her evidence in chief:-

> "When Shiraz (appellant) came to collect his child at 1.30 p.m., I invited him to lunch but he declined saying "My wife is cooking lunch."

And on the same point, P.W. 13 the father, said:-

> "We asked him 'where is Zainab?
>
> He said, 'she is at home cooking."

From the 5th we move to 7th December, 1987, and there was dispute on the evidence that on that day, the body of the deceased was discovered along Link Road on the Nairobi / Mombasa highway. The body was tied with strings inside a "buibui" and both breasts had been chopped off. Dr. George Kingu Mwaura (P.W. 1) performed the post-mortem examination on the body and his conclusion was that death had been caused by asphyxia due to manual strangulation by a ligature around the neck.

Meanwhile, having collected his son from the house of his in-laws, the appellant, on the same 5th December, 1987, told Mohamed Hanif (P.W.8) at about 3.30 p.m that the deceased had gone to buy vegetables but had not returned. The appellant was in tears when he spoke to P.W.8. He later on reported the matter to Omar Hussein (P.W.10) and together with P.W.8, P.W.10 and the appellant, they went to the appellants in-laws to report the disappearance of the deceased. On 6th December, 1987, the appellant reported the matter to Krishan Lal Saroy (P.W. 9) who was his neighbour. When the appellant went to report to P.W. on 6th December at about 9.30 a.m. the appellant was sobbing. The evidence of P.W.9 was that the appellant told him that the deceased had gone to buy vegetables at Pangani Shopping Centre and had not returned. It was at the prompting and with the assistance of PW.9 that the appellant reported the disappearance of the deceased at Pangani Police Station. Following the discovery of the body of the deceased, the appellant was eventually arrested by Chief Inspector Kepher Mboshe (P.W. 17) on 11th December, 1987. On that day, the appellant made an inquiry statement under caution to P.W. 17. The appellant totally denied any involvement in the death of his wife. Matters rested there until 17th December, 1987; the appellant was still held in police custody and as at that time (1987), this long detention in custody was not authorized by law. On that date, however, P.W. 17 got information that the

appellant owned some store along Baridi Road in Pangani, P.W. 17 asked the appellant about the store and the appellant said that the key to the store was with someone at River Road, P.W.17 left with the appellant to go to River Road out on the way, the appellant told P.W.17 something which made that officer go back with the appellant to the station. At the station, P.W.17 asked the appellant what confidential information he wished to communicate to him (P.W.17). As a result of what the appellant told P.W. 17, the latter cautioned him and after the caution the appellant offered to P.W. 17 Kshs 200,000/= after saying he had killed his wife. He then said the keys to the store were at Pangani, in a cousin's house. They drove to the house and the appellant himself removed the keys from behind some door and they then proceeded to the store. From the evidence on record, it is clear to us beyond a shadow of any doubt that the deceased was killed within the store. Her dismembered breasts were found there and the appellant himself agreed the breasts were found in the store. The floor of the store was heavily stained with blood and relevant items like knives, strings blanket and clothes were found there. All had blood stains in one way or the other.

In the store the appellant is alleged to have told P.W. 17 and we shall try to quote:-

> "After we entered the store, the accused showed me the place where the body was laid. There was a lot of blood. There was plywood which covered the blood, some of it spread out of the plywood. That plywood is TT3. He raised the plywood and he showed me a knife, underneath the plywood at the other end of the plywood. The knife is TT4 (MF18)…. He informed me that this is the knife which he used to cut the breasts of the deceased…………………….in the store, there were wooden shelves to keep motor vehicle spares. It appeared to me that it was a store for motor vehicle spares. One of the shelves the accused showed me two knives and some sisal strings
>
> …………… He said that he used the knives to cut the strings in order to tie the hands and legs to the deceased to keep it in position. He also said he used some of the strings to tie the body with "buibui" cloth.
>
> He also showed me a rungu with which he hit the deceased. The rungu was lying on the floor………………….. He also showed me the scarf of the deceased with which he strangled deceased. It is Ex. TT8……………."

We have already set out in full the appellant's grounds of appeal and though there is no specific ground to the effect that the learned Judge wrongly relied on inadmissible evidence Mr Kivuitu's first point was that most of the evidence given by P.W.17 and part of which we have attempted to set out hereinabove was inadmissible. Mr Kivuitu's submissions on this point were that while section 31 of the Evidence Act.Cap 80 Laws of Kenya, allows the reception of evidence relating to facts discovered as a result of information given by an accused person that section does not allow the reception of evidence which in effect amounts to a confession. Mr Kivuitu submitted that it was right for P.W.17 to say in his evidence that the appellant said:-

> "This is the knife"

The knife would have been discovered as a result of the information given by the appellant. But Mr Kivuitu submitted that section 31 of the Evidence Act cannot provide a basis for the further evidence by P.W. 17 that the appellant had said he has used the knife to cut off the breasts of the deceased. We agree with Mr Kivuitu that some limitation must be placed on the provisions of section 31. If P.W.1 7 had, for instance, been a police constable we have no doubt that he would have been allowed to say that the appellant had shown the knife to him, but he certainly would not have been allowed to add that the appellant had told him that he (appellant) had used the knife to cut off the breasts of the deceased. This would be so because confessions can only be taken by a police officer of or above the rank of, or a rank equivalent to an inspector (section 28 [b]) of the Act. While the discovery of the knife would be a fact based on information given by the accused person, the further evidence regarding the use to which the knife was allegedly put cannot be a fact discovered as a consequence of such information. The distinction is very technical but we think it is vital and must always be kept in mind. How does that position apply here. It must not be forgotten that P.W. 17 was a chief inspector of police, a rank above that of an

inspector. He had, accordingly authority to take a confession from the appellant and once the safeguards for receiving oral confessions were complied with, there was nothing wrong with P.W.17 giving evidence of what the appellant said. The learned Judge and the assessors were clearly satisfied that the appellant not only led P.W. 17 the various use or uses to which he had put the items he showed P.W. 17. We agree with Mr Kivuitu that oral confession must be received in evidence with a lot of care and caution. But once a court is satisfied that an accused person did make an oral confession and that all the rules as to the voluntariness of any confession were complied with, then there cannot be any legal basis for excluding such evidence. The Judge and the assessors were satisfied on these points and on the record before us we can find no reason to disagreement.

We think we must next consider ground two of grounds of appeal which complains that the appellant was convicted on retracted and / or repudiated confessions without due corroboration of such statements by other independent evidence. Apart from the oral confession to P.W. 17, the appellant was said to have recorded a cautioned statement to Mr Stanley Mutung (P.W.18) and Assistant Commissioner of Police who was the Provincial Criminal Investigations officer in charge of Nairobi. P.W. 18 said the appellant made the statement to him on 17th December, 1987, though the dates were altered from 18th December, 1987. The appellant alleged he had been threatened by one Shaw into making the statement but after a lengthy trial within the trial the learned Judge admitted the statement in evidence. The Judge took into account the alteration of the date from 18th to 17th December and he also took into account the appellant s allegation that Shaw had bullied him on 17th December and that he (the appellant) made the statement on 18th December. The statement was an extremely detailed one and the appellant at least admitted that he gave to P.W.18 the details in the statement regarding his family background. He only denied the incriminating parts of the statement. Though the appellant had been in unlawful police custody for a long time before making the statement in question, we are satisfied that in the particular circumstances of this case, the Judge was right in admitting the statement. It was agreed on the evidence that while P.W 18 and Shaw together with P.W. 17 and the appellant were at the store. It was the appellant who on his own volition said he wanted either to see P.W. 18 or to go with P.W. 18. The reason for the request was because P.W. 18, in the eves of the appellant, appeared to be more civilized and humane than Shaw whom the appellant said he dreaded. There was no allegation by the appellant that P.W. 18 at any time molested him in any way and in any case the evidence of P.W. 18 was that Shaw never went with him to his office where he recorded the statement and further that Shaw was never with him during the recording of the statement. In these circumstances, we think the learned Judge was entirely right in coming to the conclusion at the appellant voluntarily made the statement to PW18 and that being so the statement was properly admitted in evidence.

The statement to PW18 and the oral confession to PW17 were both retracted and / or repudiated. The learned Judge and the assessors were obviously of the view that these confessions could both but be true. Of course it is always unsafe to act upon a repudiated or retracted confession without corroboration; rarely does that happen and the courts invariably look for corroborative evidence in such cases. But our understanding of the law is that it is NOT illegal for a court to act upon a retracted and / or repudiated statement without corroboration. Where the court is alive to the need for corroboration but is nevertheless satisfied that the repudiated and / or retracted confession cannot be but true the court is perfectly entitled to act upon such a confession even in the absence of corroborative evidence. That is our understanding of the case of Tuwamoi v Uganda (1967) EA 84 and the subsequent line of authorities on the issue. In Tuwamoi's case, the then Court of Appeal for East Africa having gone into a very detailed examination of the origin of the law in East Africa regarding retracted and repudiated or both retracted and repudiated confessions stated as follows at pg 91 letters F to H:-

> We would summarise the position thus – a trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after consider and all the material points and surrounding circumstances that the confession cannot be but true."

We are satisfied that is still the correct legal position in Kenya with regard to retracted or repudiated or both retracted and repudiated confessions.

In the case of this appellant, however, we think that there was more than ample other independent evidence to corroborate his confessions and even if those confessions were to be wholly excluded, the other independent evidence would have been adequate and found a conviction.

The appellant was the last person who was seen with the deceased when she was still alive. After he and the deceased left the house of P.W.13, the deceased was never seen alive again. Thereafter the appellant told P.W 12 and P.W. 13 that he had left the deceased cooking in their house. That was obviously a lie. To P.W. 8 and P.W 9, the appellant said the deceased had gone to buy vegetables at Pangani Shopping Centre: again that was obviously a lie. Why was the appellant telling these obvious lies?

In RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226, the appellant was there convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that:-

> "The force of suspicious circumstances is augmented wherever the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain: false, incredible or contradictory statements given by way of explanation. If disproved or disbelieved become of substantive inculpatory effect."

This case, in our view, does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond a reasonable doubt is solely and squarely upon the prosecution. But its basic holding, namely that where an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent available evidence. The appellant's obvious lies to P.W. 8, P.W.9, P.W. 12 and P.W.13 as to the whereabouts of the deceased were capable of providing corroboration to his confessions. We agree that the other evidence brought against the appellant was wholly circumstantial in the sense that no one ever saw the appellant kill the deceased. But it was proved that the deceased was killed in the store and the appellant was the person in charge of that store.

In his statutory statement from the dock, he appeared to say his cousin (P.W. 10) had the key to the store as had his deceased wife. Nobody, however, suggested that to P.W.10 when he testified and this assertion was repelled by the Judge was false. We agree with him. In the circumstances of the case, nobody else could have lured the deceased into the store and the appellant must be the person who did so. That is what he said in his confession to P.W.18. The circumstantial evidence itself which the Judge and the assessors accepted irresistibly pointed at the appellant as the perpetrator of the crime and the evidence was wholly inconsistent with his innocence.

Ground four of the grounds of appeal is to the effect that the circumstantial evidence was not corroborated: we are not aware of any requirement of law that circumstantial evidence needs to be corroborated. In ground one it is said that there was no evidence establishing malice aforethought on the part of the appellant. The evidence on record, however, shows that the killing of the deceased was calculated and planned by the appellant and we do not see how else it can be said he had no malice aforethought. Mr Kivuitu also raised before us the issue of the of the appellants sanity. There was, however, no evidence at all from which one could even infer insanity on the part of the appellant. True, two uncles of the appellant had committed suicide but there was absolutely no evidence that they did so because of some insanity as that term is understood in our law. It is equally true that the father of the appellant was an alcoholic but as Mr Etyang rightly pointed out, alcoholism is not congenital and the evidence before the Judge and the assessors was that the appellant was a man of sober and regular habits. These defences were never raised before the Judge and the assessors and we do not see the basis upon which they could have been raised. The appellant's defence was that he never killed his wife. That defence was proved to be false and the Judge and the assessors had no difficulty in rejecting it. we think they were right in doing so.

Lastly Mr Kivuitu drew our attention to that part of the Judge's summing-up to the assessors where the Judge directed the assessors that corroboration of the retracted and repudiated confession of the appellant was not necessary. Taken on its face value, that appears to be a misdirection, but read in the context of the Judge's otherwise very full and careful directions to the assessors, the judge was telling them on more than what we have already set out when dealing with the case of TUWAMOI V UGANDA, supra.

On our own consideration and evaluation of the recorded evidence, we are satisfied the prosecution proved beyond a reasonable doubt that the appellant murdered the deceased on 5th December, 1987 at Pangani in Nairobi. The appellant was rightly convicted of that charge and his appeal to this Court must accordingly fail. We order that the appeal be and is hereby dismissed.

Dated and delivered at Nairobi this 16th day of November, 1995

J.M. GACHUHI

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JUDGE OF APPEAL

R.S.C. OMOLO

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL