



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA APPEAL**

**AT NAKURU**

**Civil Appeal 13 of 1994**

**DANIEL KAMAU NJOROGE.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Appeal from a conviction and judgment of the High Court of Kenya at Kericho (Nambuye, J.)  
dated 1/12/93**

**IN**

**H.C.CR.C. NO. 8 OF 1993)**

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**JUDGMENT OF THE COURT**

The appellant, Daniel Kamau Njoroge, was convicted of murder in the High Court of Kenya at Nakuru (Lady Justice Nambuye) on December 1, 1993 and sentenced to death. He has appealed to this Court against both the conviction and the sentence.

Paul Kipkemboi Sambu (PW1) and his brother the deceased herein, were in their house at about 7 p.m. listening to the radio when they smelt smoke of a burning house. They dashed out to try to find out where it emanated from and on looking at different directions they saw a house, 100 metres away, burning in the compound of their neighbour, Titus Mwangi. On rushing there they found the appellant putting out the fire using a small jerrican. Paul and the deceased asked the appellant the cause of the fire but apparently he was unable to explain. Their offer to assist in putting it off was rebuffed and as they were leaving the scene a large group of people emerged from the rear of one of the houses in the compound and called out the appellant. He complied and after a short conversation he returned. A few minutes later he again went away and when he returned this time he was accompanied by the same group of persons then armed with a variety of weapons namely guns, arrows and knives. They surrounded the deceased and slapped him asking him why he had set the house on fire. Sensing danger Paul fled without identifying any of their attackers. Thereafter no one knows for sure what happened to the deceased. In the morning of the next day his body was discovered in a shamba about 40 meters from the burnt house. It had multiple cuts on the head, legs and hands. A post mortem performed on his body a week after revealed that the deceased had suffered multiple deep cuts on the head, face, legs and the hands resulting in the amputation of the right hand.

On November 19, 1992 at about 9.30 a.m. the appellant was arrested at Londiani Township and escorted to the local Police Station. At about 1 p.m. he recorded a statement under inquiry after duly

being cautioned by Inspector Osman Hassan. The appellant made a short statement which in effect admitted his participation in the commission of the offence. At his trial he repudiated the statement, claiming that the never gave any and that he was forced to sign a prepared one after repeated beatings administered by the Police. After holding a trial within a trial, the judge held that the statement was voluntary and she admitted it in evidence. She disbelieved the allegations of ill-treatment.

In her judgment she held:

"As regards the actual participation in the killing he has exonerated himself. However, his statement under inquiry which this court has found to be a true account of what had transpired and that it is safe to act on it shows that 1<sup>st</sup> accused was present throughout the whole transaction and he only ran away after the deceased had beencut."

**Mr. Waweru, for the appellant, has submitted that the learned trial judge erred in admitting in evidence the inquiry statement which was not made by the appellant and in failing to consider the fact and evidence that the appellant was apprehensive and uneasy at the time he allegedly volunteered the said statement. Mr. Waweru further contended that in any event that statement having been repudiated and being completely uncorroborated, could not in itself form a basis for conviction.**

**We have given Mr. Waweru's submission the most anxious and careful consideration. Though the record shows that the proper caution appears to have been administered before the inquiry statement was recorded. Nevertheless Inspector Osman Hassan admitted during the trial that when the appellant who had been in custody was taken before him to record the statement he looked "worried and not at ease". Alfred Kibagendi, a nurse attached to the Prison Dispensary testified that when he examined the appellant he was coughing blood and complained of chest pains and of having been assaulted. The nurse further observed a wound on the head. He classified the injuries as being of soft tissue nature. The appellant attended treatment on several occasions before he got healed. The only reasonable conclusion is that the appellant received the injuries he complained of while he was in custody and before Inspector Osman Hassan recorded the inquiry statement. That statement was therefore not voluntarily given and should have been rejected had the learned trial judge properly directed herself on the law and facts. Her failure to do so on this issue was a fatal misdirection.**

**There was no direct evidence adduced at the trial implication the appellant in the killing of the deceased and it follows therefore that the conviction was unsound and cannot be allowed to stand.**

**The learned Assistant Deputy Public Prosecutor Mr. Etyang, who appeared for the Republic, properly conceded the appeal and does not support the conviction. With respect, we think he is right and we agree with him. In the circumstances, we allow the appeal, quash the conviction for murder and set aside the sentence of death. The appellant shall be set at liberty forthwith unless he is otherwise lawfully held.**

**Dated and delivered at Nakuru this 30<sup>th</sup> day of September, 1994.**

**J.E. GICHERU**

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**JUDGE OF APPEAL**

**M.G. MULI**

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**JUDGE OF APPEAL**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**