IN THE COURT OF APPEAL

AT NAKURU

(Coram: Gicheru, Kwach & Cockar JJ A)

CRIMINAL APPEAL NO 77 OF 1992

WILLIAM KIPKOSGEI MIBEI

SAMSON BARNO SUM

STEPHEN KIPCHUMBA BUSIENEI

GRACE CHERONO CHUMBA . ……..……. APPELLANTS

VERSUS

REPUBLIC……..…..…….RESPONDENT

(Appeal from conviction and sentence of the High Court of Kenya

at Eldoret (Aganyanya J) dated 26th September, 1990

in HC CR C No 11 of 1989)

JUDGMENT

William Kipkosgei Mibei (the first appellant), Samson Barno Sum (the second appellant), Stephen Kipchumba Busienei (the third appellant) and Grace Cherono Chumba (the fourth appellant) were arraigned on an information which alleged that on 1st and 2nd June, 1988 at Lainguse Farm, Ainabkoi West location within Uasin Gishu district of the Rift Valley province they jointly murdered Musa Githigi Njoroge (the deceased). At the conclusion of the trial, malice aforethought not having been established, they were found guilty of manslaughter, convicted accordingly and sentenced to 12 years imprisonment each. They now appeal against their convictions and sentences.

On 1st June, 1988, around noon, the deceased left his home telling his wife that he was going to visit a sick neighbour. He did not return but the following morning, his body was found at the bottom of his farm decapitated and with both arms chopped off. The deceased had apparently joined in a *changaa* drinking spree in the neighbourhood ending up in the house of the fourth appellant where he was last seen alive at or about 8 pm on 1st June, 1988.

Following the discovery of the deceased's body, the matter was reported to the police and these

appellants, and a fifth suspect, were arrested and charged with his murder. This suspect, one John Kibet Tallam, was acquitted at the end of the trial and does not therefore feature in this appeal.

The convictions of the second, third and fourth appellants were based solely on the confessionary statements made to the police by the first appellant implicating them in the killing of the deceased. In his statement under inquiry made on 5th June, 1988, to Chief Inspector Jotham Lubanga of Eldoret CID (PW27), the first appellant gave an account of his movements on 1st June, 1988 in the company of the second and third appellant until they finally arrived at the house of the fourth appellant at 6 pm. The deceased also joined them shortly afterwards and the consumption of *changaa* continued. The third appellant was the first to leave. The first and second appellants and the deceased stayed behind. The first appellant said the fourth appellant asked them to kill the deceased at an agreed fee, and that he and the second appellant did so in the presence of the fourth appellant but in the absence of the third appellant, who had withdrawn temporarily to see someone off and upon his return found the deceased already dead. He explained how the deceased's arms were cut off and thrown into a pit latrine belonging to the fourth appellant, and how the deceased's head which had been cut off had been thrown into a well belonging to one Waweru Kiboko (PW11). He said the fourth appellant paid each one of them Shs 2,000/-.

In his charge and caution statement made to Inspector Charles Makata

(PW25) on 10th June, 1988, he repeated what he had said in his statement under inquiry five days earlier except that this time round he said they had killed the deceased in his own house after being instructed and paid to do so by the fourth appellant. The judge, quite rightly, rejected this version because if that had been the case, the deceased's wife would have witnessed it. In his statement under inquiry, the third appellant admitted returning to the fourth appellant's house and finding the deceased - already dead but he did not admit having taken part in the killing.

The first, third and fourth appellants retracted their statements to the police and the judge held two trials within a trial in order to determine their admissibility. The appellants alleged that they had been tortured by the police to procure those statements.

The first trial within a trial concerned the charge and caution statement of the first appellant. The judge found that the allegations of torture by the first appellant were not proved and held that the statement had been made voluntarily and therefore admissible.

The second trial within a trial was held to determine the admissibility of the statements under inquiry made by the first, third and fourth appellants. The judge held that these too had been made voluntarily and were admissible. In relation to this set of statements, the judge, against established practice, held an omnibus trial within a trial. This was a serious irregularity. A trial within a trial should always be held for a statement made by each accused person separately and under no circumstances is an omnibus procedure to be used. The other irregularity is that there is no indication on the record that the assessors were sent out during the trial within a trial. These two irregularities would have been sufficient to render these statements inadmissible were it not for a further reason to which we shall allude in this judgment presently.

As we have already said, all these appellants were convicted on the strength of the confessions made to the police by the first appellant which implicated the other three appellants. On 9th June, 1988, the first appellant was examined by Dr Gilbert Anjichi (PW10), and found to have a swelling on the left back of his head with accumulation of blood below it. The injuries were only hours old and he had blood stains on his shirt. The first appellant told the doctor he had been assaulted by the police. The first appellant was arrested on 3rd June, 1988, and made statements to the police on 5th and 10th June, 1988. He sustained those injuries while in the custody of the police and therefore the burden of proving that they were not caused by the police in the course of their interrogation of the first appellant lay with the prosecution. The prosecution did not discharge this burden and it is not therefore an unreasonable inference to make that the first appellant was assaulted by the police as he alleged in the course of his interrogation. The judge's finding that the statements were made voluntarily cannot stand because it was clearly based on a total misapprehension of the evidence. The statements were consequently inadmissible and were wrongly

received in evidence.

Once the statement under inquiry and the charge and caution statement of the first appellant are excluded and left out of contention, there is no other evidence left upon which the convictions of the second, third and fourth appellants can be sustained. The same would also apply to the first appellant if that was the only evidence against him.

Mr Murgor who appeared for the fourth appellant in this appeal submitted that even if the statements of the first appellant were admissible in evidence, they were not sufficient to secure the conviction of the fourth appellant. He submitted that a conviction will not be based on a retracted confession of a co-accused in the absence of other evidence against the other accused implicated in the confession. This is in the nature of an accomplice evidence which in the normal course of events would require corroboration and has been held to be evidence of the weakest kind. Mr Murgor drew our attention to the contradiction in the statements regarding the *locus in quo* which made their veracity doubtful and reduced their evidential value.

Mr Bwonwonga, for the Republic, following some prompting from the Court conceded the appeals of the second, third and fourth appellants and we endorse, without any hesitation, the course he took. The result is that the appeals of these three appellants are allowed, their convictions are quashed and the sentences set aside and they are ordered to be set free forthwith unless otherwise lawfully held.

That leaves for consideration only the appeal by the first appellant. Apart from the confessions, which have been excluded, what other evidence was there against the first appellant? On 3rd June, 1988, at about 3 pm IP Frederick Makhoha (PW17), visited and searched the first appellant's house where he recovered one long trouser and a shirt under a bed. He noted that they had blood stains and took them as exhibits. He also found personal belongings of the deceased including a coat, a pullover, a shirt, shoes and an identity card in a sack hidden in a hole in a nearby forest. The two items of clothing recovered from the first appellant's house were examined by Tom Muthuri Mwangi (PW28), a government analyst at the Government Chemist Department, and found to be extensively stained with human blood belonging to the deceased's blood group. On 5th June, 1988, this appellant led another police officer to his house, and this time a blood-stained *panga* was found which on examination was found to be the blood group of the deceased. On the same day, this appellant led IP Jonathan Lubanga (PW27) to a well belonging to Waweru Kiboko (PW11), which he pointed to this police officer as the place where he had thrown the deceased's head. This was in the presence of Cpl Richard Misik (PW19), Waweru Kiboko (PWl1) and members of the public. After the water had been drawn from the well a human head, which was identified as that of the deceased, was found. We note that although both the first appellant and the deceased had the same group "0" blood, but the government analyst's report further showed that the deceased's blood unlike the 1st appellant's blood had phosphoglucomutase 2+2, which was the blood found on the shirt and trouser recovered from the first appellant's house.

The judge correctly directed himself that there was no direct evidence linking the first appellant with the killing of the deceased. The only evidence against the first appellant is purely circumstantial. This relates to the discovery of the deceased's head with his assistance; the discovery of the *panga* hidden in the grass near the first appellant's house; the blood-stained trouser and shirt found hidden under a bed in the first appellant ' s house.

It was held by the Court of Appeal for Eastern Africa in the case of *Simon Musoke v R* [1958] EA 715, that in a case depending exclusively upon circumstantial evidence, the Court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt. The principle stated in that case was in complete accord with the formula laid down by the same Court in the earlier case of *Rex v Kipkering arap Koske* (1949) 16 EACA 135, and has been followed by Courts in Kenya for many years. The inculpatory facts against the first appellant in this case are the blood-stained clothes found in his house which upon examination were found to contain the deceased's blood; the leading of the police by the 1st appellant and the discovery of the *panga* hidden in the grass near the first appellant's house stained with the deceased's blood; and the discovery of the deceased's head in the well at the direction of

the first appellant. In our view, these inculpatory facts are incompatible with the innocence of the first appellant. How could his clothes have been stained with the deceased's blood unless he was involved in the attack which led to the death of the deceased? And how could he have known where the deceased's head was unless he himself had disposed of it in the well? These facts are incapable of explanation upon any other reasonable hypothesis than that of the first appellant's guilt. The circumstantial evidence in this case is watertight and we are satisfied that the first appellant was properly convicted. We find no merit in his appeal and it is dismissed.

Dated and Delivered at Nakuru this 26th day of February, 1993

J.E. GICHERU

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JUDGE OF APPEAL

R.O. KWACH

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JUDGE OF APPEAL

A.M COCKAR

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JUDGE OF APPEAL