IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi, Gicheru & Cockar JJ A)

CRIMINAL APPEAL NO 31 OF 1987

MAANZO…….……... APPELLANT

VERSUS

REPUBLIC…...……..…… RESPONDENT

(Appeal from a conviction and sentence of the High

Court of Kenya at Machakos (Mr Justice F E Abdullah)

in Criminal Appeal No 75 of 1986)

JUDGMENT

The appellant and another person were jointly charged with the offence of murder contrary to section 203 section 204 of the Penal Code in that on 7th October, 1985 at Mutwamwaki village in Kangonde sub-location in Machakos district they jointly murdered Mary Ndunge. At the close of the prosecution evidence, the superior court found that there was no evidence against the appellant's co-accused and he was therefore acquitted. The appellant was put on his defence and at the close of the trial the superior court found the appellant guilty as charged, convicted him accordingly and passed the mandatory sentence of death against him.

Briefly the facts are that on the material date sometime around 6.00 pm in the evening the three and a half years old deceased was at home with her two elders MM1 (PW13) and MM2 (PW14) when according to the two brothers the appellant, whom they knew as a neighbour, came to their house and sent the children to the river on the pretext that their mother had instructed that they should go and fetch water.

Somewhere near a hill, on their way to the place of water, the boys were told that the small girl, the deceased, will remain behind and the boys should run to fetch water and not to look behind. The children obeyed, but it did not escape the notice of both the brothers that while they proceeded to fetch water the appellant took the girl to the forest. At about 6.00 pm, on coming home, their mother (PW10) found the children missing. She started looking for them and then saw the two boys coming from the river. When she asked them about their sister the boys recounted what had happened and that the appellant had taken away the girl. The mother's search that evening for the girl and the appellant proved fruitless but on the following day the dead body of the girl was found in the cattle dip. Medical report stated that she had

been defiled, and her private parts disclosed a tear, 6 cm x 3 cm, in the vagina. Death was caused by drowing.

It is to be noted that the mother (PW10) had, at the time of her giving evidence, put the age of the elder boy (PW13) as 10 years and that of the younger boy (PW14) as 7 years. This was a year after the tragedy which would, therefore, make the elder boy (PW13) 9 years old and the younger (PW14) 6 years old at the material time. The learned judge, who of course saw the two boys, had at the time of their giving evidence noted the elder (PW13) as "a child of about 6 years" and the younger (PW14) as a " a young boy of about 4 or 5 years". This considerable disparity in ages as given by the mother and estimated by the learned judge respectively, however, has not caused any prejudice to the appellant because although the evidence of a 10 years old would normally have carried more weight and assurance than that of a 6 years old, the learned judge had approached the elder boy's evidence as being that of a 6 years old. In any case whether the boy was 10 years old or 6 years old he was a child of tender age and his evidence, as well as that of the younger brother (PW14), required corroboration – sec 124 of the Evidence Act (Cap 80). The learned judge had that in mind and very correctly directed the assessors on need for corroboration of the evidence of these two children.

Apart from the evidence of the two young boys there was also the inculpatory but retracted charge and caution statement of the appellant which was admitted after a trial within a trial. The learned judge, having accepted the evidence of the young boys convicted the appellant because he found that their evidence was corroborated by the retracted confession of the appellant and also by the evidence of the mother. We shall have more to say on this "finding of corroboration" by the learned judge at a later stage.

Mr Maosa for the appellant argued three only of the eight grounds of appeal that he had filed. These were grounds No 6,8, and 1 argued in that order. With regard to ground No 6 which stated provisions of section 77 (2) (f) of the Constitution and section 198 (1) of the Criminal Procedure Code had not been followed, Mr Maosa complained that the appellant's language was *Kikamba* but, except on 13th June, 1986, when an application was made for the appellant to be examined by a psychiatrist, there was no evidence in the record to show that thereafter any part of the proceedings was ever interpreted to the appellant in his language *Kikamba*. However, he felt satisfied on nothing that the court clerk Mr Mbithi, a *Mkamba*, who had done the interpretation on 13th June, 1986, was the court clerk in attendance on every occasion during the whole of the proceedings that followed and that showed that interpretation into *Kikamba* language must have been done by him. Likewise with regard to his complaint in ground No 8 that the superior court had not waited for the pychatrist's report as to the state of mind of the appellant that had been ordered for, Mr Maosa dropped this ground of appeal when he was shown the psychatrist's report dated 14th July, 1986, in the original court file stating that the appellant was fit to plead.

In respect of ground No 1 of the appeal, on which Mr Maosa dwelt at length, apart from pointing out the lack of both continuity and consistency in the evidence of the two young boys, which in our view was not unexpected in view of the young ages of both, Mr Maosa then pointed out the obvious fact that there was no corroboration of the evidence of the two young children. We agree with that observation by Mr Maosa. The evidence of the mother (PW10) was basically what her two sons had told her. The children's report to her did not in law constitute a corroboration of their evidence. Hers was heresay evidence. Its only value lay in the fact that it showed a consistency in the children's evidence. As regards the charge and caution statement, which was inculpatory, objection had been raised to its admission. It was admitted after trial within trial and the learned judge, quite correctly, termed it as a retracted confession. As long ago as 1935 in *R v Mutwiwa s/o Maingi* (1935) 2 EACA 66 it was laid down by the Court of Appeal for Eastern Africa that it was unsafe to act on a retracted confession in the absence of corroboration in material particulars. We wish to add that although it is not a rule of law it has become a matter of practice that in case of a retracted confession the trial court looks for corroboration: *Gathugu s/o Migwe & Another vs R* (1953) 20 EACA 294. As a retracted confession needs corroboration it cannot be used to corroborate any other evidence such as the children's evidence which itself needs corroboration – *R v Aryato d/o Ochubura*, (1936) 3 EACA 120.

The misdirections by the learned judge which we have pointed out above are of such a grave nature as would lead to a quashing of the conviction. However, we observe that the cause for misdirections lay in

the fact that the learned judge had failed to grasp the true import of the prosecution evidence. The evidential value of the testimony of the two young boys without corroboration is nil. What they had witnessed was only of assistance in police investigations to put the police on the right track. If the evidence of the children is ignored altogether, then we are left with what really constitutes the strength of the prosecution evidence *viz*: the inculpatory but retracted charge and caution statement of the appellant and the medical evidence relating to the injuries that had been inflicted to the genitals of the deceased infant. With regard to the retracted confession the Assistant Deputy Public Prosecutor, Mr Etyang, submitted that if the Court is fully satisfied that the confession cannot but be true then it can proceed to convict on it even without corroboration. We entirely agree with that proposition but unfortunately the learned judge did not explore that aspect of this retracted confession, although we feel that had he done so he would, even after exercise of great caution and reserve that is necessary, have had ample valid reasons to feel fully satisfied that this particular retracted confession could not but have been true and so could have proceeded to convict. However, as the learned judge did not do so we will confine ourselves to the corroboration to the retracted confession supplied by the medical evidence relating to the injuries to the genitals of the deceased infant.

In his charge and caution statement the appellant said that at about 6.00 pm that evening he was passing through the home of Masai (the deceased's father) when he met the son of Bende (presumably the 2nd accused) who told him he wanted to kill Masai's wife because of a grudge. Inside Masai's home they found the small children. On the instigation of that man the appellant, by means of a trick, got rid of the children so that only the small girl was left behind. That man then asked the appellant to defile the small girl. He attempted but found that she was so small that his penis would not penetrate. At that time other man said that he was the person who knew that job. That man inserted his hand into the vagina of the small girl. The appellant on seeing that left but he saw that man carry the child who was crying, and throw her inside the cattle dip. The evidence of the doctor (PW15) was that there as a tear in the vagina of the three and a half years old female child. The tear was 6 cm x 3 cm. In his opinion the tear had been cause before her drowning. It was a penetration wound. Penetration by a blunt object could have cause that tear.

It will be observed that the injury that had been caused to the vagina as shown by the medical evidence must have been the natural consequence of the cruel act so heartlessly perpetrated on the ill-fated child as described in the retracted confession of the appellant. To corroborate a retracted confession, all that is required is some evidence *aliunde* which implicates the accused in some material particular and which tends to show that what is said in the confession is probably true – *R v Okitui s/o Edeke* (1941) 8 EACA 40. In our view the medical evidence relating to the nature and extent of injury to the vagina of the unfortunate infant provides strong corroboration of the appellant's retracted charge and caution statement. We are satisfied, misdirections by the learned judge notwithstanding, that the appellant's conviction was safe, and we dismiss the appeal. It is so ordered.

Dated and Delivered at Nairobi this 5th day of May, 1993

J.M. GACHUHI

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JUDGE OF APPEAL

J.E. GICHERU

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JUDGE OF APPEAL

A.M COCKAR

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JUDGE OF APPEAL