



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(Coram: Gicheru, Omolo & Tunoi JJ A)**

**CRIMINAL APPEAL NO 49 OF 1993**

**SIMON JUMA WAMBUNYA ..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

at Kakamega (Mr Justice Mbogholi) dated 31st October, 1989

in CR A No 16 of 1989)

**JUDGMENT**

The appellant was convicted of the murder of Christopher Wanyama on 6th July, 1988, at Nakhwabuya village, Central Kabras location in Kakamega district and sentenced to death.

The prosecution's case was that the appellant persuaded the deceased, his relative and a boy aged 7 years old, to accompany him into a nearby forest at about 3.00 pm on the material day. A few hours later, the appellant returned without him and denied knowledge of his whereabouts. An extensive search for him was in vain until about two weeks afterwards when a skeleton was found on a river bank. The deceased's mother, Dorcas Chikamai (PW3) identified a piece of cloth found near the skeleton as belonging to him.

A post-mortem performed by Dr Jason Kaviti (PW2) could not reveal the cause of death due to the advanced state of decomposition and because the majority of the organs were missing from the bony skeleton.

The case against the appellant depended entirely on a confession under charge and caution he is alleged to have made to Inspector Wambugu (PW11) on 4th August, 1988. During the trial within trial the appellant retracted it. He claimed that the police undressed him, tied his legs, hanged him on a tree and whipped him. To avoid further torture he decided to admit that he killed the deceased. He told the Court that he cheated Inspector Wambugu who recorded what he told him. Some support for this claim is to be found in medical evidence. Dr Josephine Maende (PW1) examined the appellant on the same day. She observed that both his feet were swollen and that the left big toe had a broken nail. The approximate age of those injuries was a matter of days, when he had been in custody appreciably longer than that. The learned judge rejected the evidence of the appellant as to his having been beaten while in police custody.

We observe that the learned judge lost sight of the fact that the burden of proof that the statement was given voluntarily rested on the prosecution and the evidence that the appellant had been subjected to some form of torture and violence while in custody made the discharge of that burden more difficult. It was not sufficient to merely state that he had observed the demeanour of Inspector Wambugu and believed his assertion that he did not assault the appellant without taking into account his injuries. In the circumstances, we think the learned judge should have held the charge and cautionary statement inadmissible.

In the case of *Tuwamoi v Uganda* [1967] EA at page 91 it was said:-

“... 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 considering all the material points and surrounding circumstances that the confession cannot but be true.”

In the present case the focal point in the prosecution’s case is that the appellant led the deceased into the forest, committed an unnatural offence on him and strangled him to death.

Moreover, there was no convincing evidence that the appellant was the last person to be seen with the deceased before entering in the forest. Nor does anyone for certain know of their activities therein. The vital question as to whether the deceased was killed in the manner asserted by the prosecution and described in the retracted confession cannot be answered. There was no way of ascertaining satisfactorily in all the circumstances of the case that the confession was true. Its value as a whole was destroyed and cannot be relied on. It lacked corroboration in some material particular by independent evidence acceptable to the Court. Further, we are not fully satisfied after having considered all the material points and surrounding circumstances of the death of young Christopher that the confession cannot but be true.

If the alleged confession was excluded, it follows that there remained no case at all against the appellant. We note that the State concedes this appeal and does not support the conviction.

After full consideration of the entire evidence on record, we are constrained to come to the conclusion that it would be unsafe to allow the appellant’s conviction to stand. We, therefore, allow this appeal, quash the conviction and set aside the sentence of death passed against him.

Dated and Delivered at Kisumu this 17<sup>th</sup> Day of June, 1993

**J.E. GICHERU**

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**JUDGE OF APPEAL**

**R.S.C OMOLO**

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**JUDGE OF APPEAL**

**P.K.TUNOI**

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**JUDGE OF APPEAL**