IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Masime, Cockar JJ A & Omolo Ag JA)

CRIMINAL APPEAL NO 17 OF 1991

BETWEEN

JANE BETTY MWAISEJE .....APPELLANT

JOHN LUNGAZO MUGIZA .....APPELLANT

DANIEL MUNUBI AZERE .....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nairobi (B K Tanui, J) dated 22nd January, 1991

in

Criminal Case No 47 of 1988)

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JUDGMENT

The three appellants were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code in that on the night of 23rd and 24th November, 1986, at Adams Arcade, Nairobi, they jointly with others not before the Court murdered Boniface Mwaiseje. They were all found guilty and convicted as charged and sentenced to death by Tanui J. This appeal by them is against their conviction.

Briefly the facts as per the prosecution evidence are that the deceased, an employee of UNESCO stationed at Nairobi at the time of his death, was the husband of the lst appellant Jane Betty Mwaiseje (hereafter referred to as the lst appellant). There is evidence that the lst appellant did not approve of the casanovian way of life that the deceased had adopted and had on occasions not long before the latter's death expressed her strong disapproval to a family friend Mrs Sharok Ferozi Hirsi (PW6). Most of the afternoon of Sunday, 23rd November, 1986, and the evening, the deceased had spent in company with three friends James Mpungi (PW7), a Tanzanian employed by UNEP, Nancy Wairimu Mugo (PW5) a secretary with Primer Limited, and formerly an employee at UNESCO in Paris where she first met the deceased, and Betty Ngatia (PW9), a secretary with Commercial Office Company. The deceased was using a blue Datsun 120Y car bearing a United Nations registration number 42UN 121 K which had been

left with him during 1986 by Mr Ndekezya (PW 25), a UNESCO employee who had proceeded overseas.

In this car the four of them did rounds of different hotels such as Jacaranda Hotel, Inter Continental Hotel, Grosvenor Hotel, and Silver Springs, drinking and eating at all these places, until at about 11.30 pm the deceased dropped Betty Ngatia, who was the only companion now left in the car, at Dagoreti Corner where she lived. That was the last time that the deceased was seen alive. Earlier that afternoon the deceased, who was with James Mpungi (PW7), had picked up his son and dropped him at YMCA for tennis lessons and then had drinks at Serena while waiting for the boy to finish his tennis. The boy was later picked up from YMCA and dropped at the deceased's house at Adam's Arcade.

The deceased's own car was a white Renault 5 TL registration No KRP 986 which his wife the lst appellant also used to drive.

On the morning of 24.11.86 at about 7.30 am the dead body of the deceased was found in a ditch beside Naivasha Road in Kawangware about 600 metres from Riruta Police Post. The body was naked save for the vest and underpants. There was a rope at the neck; and the hands and feet were tied together. A yellow jerrican and a hand glove were found about 3 metres from the body which itself was 10-20 metres from the main road.

About a month later on 24th December, 1986, the body was identified by the 1st appellant (first accused) as that of her husband, the deceased.

The completely burnt out shell of the blue Datsun with its engine missing, was found on 10th December, 1986, at about 11.00 am in Kawangware village. This was later taken to Kilimani Police Station where it was photographed on 15.12.86 and eventually identified from the chassis number as being blue Datsun registration No 42UN 121 K which the deceased was driving on 23rd November, 1986. The prosecution case against the three appellants is wholly based on their inculpatory statements, all made under caution, to the police. The first appellant made two statements to the police. The first one was an enquiry statement made on 30th March, 1988 (Ex 23) and the second one was the charge and caution statement made on 1st April, 1988 (Ex12).

John (2nd appellant- second accused) made three statements. The first one was the enquiry statement made on 1st October, 1987, (Ex 22), the second one was another enquiry statement in the form of question and answer conversation which took place at the time when the 2nd appellant took the police (Supt Muiruri) to show him the various sites at which incidents relating to the murder and the disposal of the body and the car took place and which exercise was video - tape - recorded (Tape Transcription Side B Ex 28) and the third one was the charge and caution statement made by 2nd appellant on 14th October 1987.

Daniel (3rd appellant - 3rd accused) also made three similar statements to the police. The first one was the enquiry statement made on 26th September, 1987, (Ex 21), the second one was another enquiry statement video - tape recorded exactly in the same manner as in the case of the 2nd appellant, at the various crucial sites to which the 3rd appellant led Superintendent Muiruri, and the third one was the charge and caution statement made by him on 14th October, 1987 (Ex 13). All these statements by the three appellants were confessions. Briefly the story that emerges from these confessions is that the 1st appellant apparently having got fed up with her husband's (the deceased's) way of life arranged with the two appellants and one other person named as John Aggrey to kill her husband on payment of a sum of money the figure of which was given at Shs 38,000/- by the 2nd appellant in his enquiry statement, and at Shs 35,000/- by the 3rd appellant in his enquiry statement. As planned the lst appellant having earlier shown the three of them her house, came and picked them up at about 9.00 pm - 10.00 pm on 23rd November, 1986, and brought them to her house. The car used on both these occasions was the Renault T L. As the deceased had not arrived home yet the three hired assassins were taken inside the sitting room where, after they were given part-payment of their fees, they waited for the deceased. The deceased came sometime after midnight and as soon as he entered the room he was set upon by the hired assassins and killed. The dead body was stripped of clothes except for the underwears.

A rope was brought by the 1st appellant and the dead man's hands and legs were tied and his body was put into the boot of the blue Datsun. They drove off in the car following the Naivasha Road off Ngong Road until they crossed the bridge. A little further on the body was thrown into a bush and burnt after petrol was sprinkled on it. A few days later the blue Datsun car also was burnt. It is not quite clear when the engine was removed. At intervals during these operations the 1st appellant kept on paying the two appellants and John Aggrey various sums of money towards payment of fees.

It was strongly urged on behalf of the appellants that the degree of fear that was evoked on account of torture and beatings that each of the three appellants had suffered at the hands of the police in the course of their obtaining the statements from the three appellants and co-operation from the 2nd and 3rd appellants in the video tape recording, ought to have rendered each one of them inadmissible in evidence. A trial within trial was held in respect of each statement and video tape recording and thereafter, on being satisfied of the voluntary nature of each, the learned trial Judge admitted each of them in evidence. As each of the statements and video tape recordings had thereby assumed the character of a repudiated confession the learned trial Judge found corroboration of the enquiry statement and the charge and caution statement made by the lst appellant in the evidence of a family friend Mrs Sharok Ferozi Hirsi (PW6**)** relating to the conduct of the lst appellant during the month preceding the disappearance of the deceased particularly in respect of the following incidents:

1. The night when the deceased did not go home and came for breakfast the following morning at about 10.00 am at the house of PW6 (wife of PW4), the 1st appellant rang up PW6 and informed her on phone that she was sharpening a knife to fix him (deceased) up when he came home.

2. Later the same day when PW 6 went to the deceased's house with her children and noticed the house full of smoke the deceased had explained to her that on account of fear of catching Aids his wife, the lst appellant, had burnt his clothes worn by him on the previous day.

3. At that time the deceased explained the swelling on his forehead as having been caused after being hit by his wife, the lst appellant.

4. On coming down from upstairs at that time the 1st appellant immediately picked up an ashtray and tried to hit the deceased with it but PW6 intervened and held her hand.

5. Lack of concern displayed by the lst appellant at the disappearance of the deceased a day after his disappearance.

On the basis of the retracted confessions and the corroboration supplied by the above incidents all of which remained uncontroverted by the lst appellant in her evidence the Judge rejected the defence which merely dwelt on her actions after she had reported the disappearance of her husband to the police station one and a half days later allegedly because the deceased was in the habit of spending nights out of the house, and found the lst appellant guilty of murder.

Like the 1st appellant, the defences raised by both the 2nd and 3rd appellants in their unsworn statements in Court consisted only of an account of what happened to them after their arrest and the police brutality and torture which preceded the recording of each of the statements and the video tape recording exercise.

The trial Judge rejected the defences raised by the 2nd and 3rd appellants and accepted the retracted confessions which he found had narrated accurately the events relating to the murder. He did not find any corroboration of the retracted confessions. As regards the video tape recording in his view all that the video did was to reinforce and strengthen the confessions and support the prosecution case that the confessions were not only voluntary but were also true. He found both the 2nd appellant John and the 3rd appellant Daniel guilty of murder.

There were five grounds of appeal filed by Mr Otieno on behalf of the lst appellant, and six identical grounds of appeal in the 2 separate appeals filed by Mr Ramogo on behalf of the 2nd and 3rd appellants that is John and Daniel respectively. These may be summarised as follows:

1. The three enquiry statements made by the three appellants were inadmissible.
2. The three cautionary statements made by the three appellants were inadmissible.

3. The Judge erred in finding corroboration of the retracted enquiry statement and of the retracted charge and caution statement of the lst appellant in the evidence of PW6.

4. The two separate video tape recordings and the tape transcriptions of the conversation between Superintendent Muiruri and the 2nd and 3rd appellants were inadmissible.

5. The Judge erred in convicting the 2nd and the 3rd appellants on evidence solely based on the retracted enquiry statements and the charge and caution statements made by the two. There was no corroboration of any of these retracted confessions.

We shall first deal with the enquiry statement and then the charge and caution statement made by the 1st appellant.

The first objection that Mr Otieno had in respect of the enquiry statement was that the 1st appellant was arrested on 28th March, 1988, about one and half years after the murder, on information which Superintendent Muiruri had already garnered from the confessions of the other two appellants. In fact Superintendent Muiruri had enough evidence in his possession for him to have decided by 30th March, 1988, to charge the lst appellant with the offence of murder. But instead he first obtained from her an enquiry statement on 30th March, 1988. As an investigating officer it was improper for him to have done so. Further, if an enquiry statement had to be taken then the task should have been passed on to some other police officer. We find no substance in this objection. It is true that the confession statements made by the other two appellants had implicated the 1st appellant as the instigator and employer. But Superintendent Muiruri already had a statement from the 1st appellant recorded on 31st December, 1986, which was only a few days after the death. In this statement the 1st appellant had given an account of her efforts in looking for her husband, the deceased, following his non- appearance during the whole of the night of 23rd to 24th November, 1986, and the reason why she had not immediately reported about his disappearance to the police. With that statement in his possession, taken over a year earlier, we are unable to accept the proposition that on receiving the information contained in the confessions of the two co-appellants (co-accused) Superintendent Muiruri had enough evidence to have made up his mind by 30th March, 1988, to charge the 1st appellant with the offence of murder. In fact Superintendent Muiruri said during cross-examination that he had not by then made up his mind to charge the 1st appellant. In the circumstances as Superintendent Muiruri was the investigating officer it was but proper that in continuation of his enquiries he obtained the enquiry statement.

Having said all that we would also add that there is absolutely nothing wrong in an investigating officer telling an accused person:

> "I have arrested 'A' and 'B' in connection with the same offence for which I have arrested you. I have taken statements from both of them and each has said 'this' and 'this' about your part in the offence. Do you wish to say anything about it yourself?"

If after being duly cautioned the accused person then voluntarily makes a statement we see no reason for excluding such evidence merely because the investigating officer of the case already knew something about it from other suspects. The trial Judge, however, must fully satisfy himself that the statement in issue was in fact made by the accused person and that it had not come from the investigating officer's prior knowledge of the circumstances of the offence.

The next ground of objection raised by Mr Otieno was that the enquiry statement was not made voluntarily; the trial Judge had not probed the allegation of torture by the police properly, nor had he directed his mind to the reason why having first made an exculpatory statement a few days after the death the 1st appellant decided to make a confession, over a year later, in her enquiry statement. Mr Otieno relied heavily on the case of *Edong s/o Elal vs Reginam* 21 EACA (1954) p 338 in which the accused had, two days before his arrest, made a statement to the police which was exculpatory. When he was arrested

on 10th January, and charged by the police officer with the offence of murder he made a statement which was not produced but was accepted to have been a denial of the offence. On the 3rd day after his arrest that is on 13th January, he made an extra judicial statement to the magistrate which was a confession which he retracted at the trial alleging that he had invented it under the influence of fear because he was beaten by the police in whose custody he had remained after his arrest. Allowing his appeal the Court of Appeal had held that the onus of proving that a statement by an accused person is voluntarily made, is upon the prosecution. Where the trial Judge has a doubt as to the allegation that the accused was beaten, the prosecution has not discharged the onus; further if there was a good reason to think that the chain of events leading up to a confession was started by physical violence to the person of the prisoner it would be a valid exercise of a trial judge's discretion to reject the statement.

In our view there is no parallel to be drawn between *Edong's* case and the 1st appellant's case. The learned trial Judge when considering the admissibility or otherwise of the 1st appellant's enquiry statement had followed the correct principles as laid down in the case of *Njuguna Kimani & Others vs Republic* (1954) 21 EACA 316. We observe that when the enquiry statement was made by the 1st appellant she had been in police custody for about 42 hours that is from late evening of 28th March, 1988, when she was arrested up to 12.25 pm on 30th March, 1988, when she gave the enquiry statement. Superintendent Muiruri explained that on 29th March, 1988, he had a case in Court and, therefore, he took the enquiry statement on 30th March, 1988. On 5th April, 1988 she was examined by the doctor and the evidence is that the 1st appellant had not complained to him of any injuries or beating. In fact the doctor said that he had asked her if she had any complaints and she had said that she had none (cross-examination). The doctor had not observed any injuries on her. Superintendent Muiruri explained that she was taken to the doctor on 5th because she was to appear in Court. All that the 1st appellant had to say about the doctor in her unsworn statement during the trial within trial was to dismiss him as a drunk, at 9.00 am according to the medical report, who had merely asked for her age and had not examined her. The trial judge in his ruling made a note of all these facts and concluded that the enquiry statement had been made voluntarily and admitted it in evidence. We do not see any reason to differ from his finding.

It is interesting to note that during the trial within trial (p 112 of the record) the lst appellant maintained that she had not made any statement but had merely signed the papers produced by Superintendent Muiruri. That can only mean that she had signed a prepared statement. But certain details of her life given in the first few paragraphs, relating to her age, year and place of marriage, age of children, professional pursuits of her husband, year of his promotion and the period spent in Paris are such that Superintendent Muiruri could not have obtained them from anyone else but from the 1st appellant herself. So whereas she had in fact made the enquiry statement she had falsely claimed in her unsworn statement in Court that she had merely signed papers produced by the Superintendent. We on our own evaluation of the evidence produced during the trial within trial are satisfied that the lst appellant not only gave the enquiry statement to the Superintendent but also did so voluntarily and that the same was properly admitted in evidence by the trial Judge.

As regards the charge and caution statement(Ex 12) made by the lst appellant on lst April, 1988, Mr Otieno submitted that the same was inadmissible on the following grounds:

1. Inspector Onyango to whom the statement was made was a member of the investigating team.

2. Torture inflicted by the police which roused fear and thereby induced the statement.

3. No opportunity was given to the lst appellant to decide whether or not to give the statement.

As to the first complaint the total extent to which Inspector Onyango was involved in the investigation of this case was that over a year before he took the charge and caution statement from the 1st appellant, she had seen him in order to report the disappearance of her husband. A few days later when the lst appellant, a relative of the lst appellant (PW3), and some other members of UNESCO had been referred to him as the investigating officer, he had taken them to the mortuary to see if they could identify the deceased from among the bodies there. Inspector Onyango said that he was not investigating the case at the time. He had merely gone with them to the mortuary to enable them get access. Thereafter he had not been involved in

this case in any way until he recorded the charge and caution statement. The evidence is that Superintendent Muiruri, on resumption of his duties after returning from leave on 13th December, 1986, was handed over the investigations of this case by the OCPD Kilimani. The charge and caution statement was recorded by Inspector Onyango over a year and a few months later. Whether or not a particular police officer has investigated a particular case is a question of fact to be determined by the trial Judge after taking into account all the circumstances of the case. In our view there was nothing improper in the recording of the charge and caution statement by Inspector Onyango. He was not involved in the investiagations in any material sense.

As regards the torture to which the lst appellant claimed she had been subjected by the CID officers she named the officers as Joseph Muiruri and Motoka. When dealing with the admissibility of the enquiry statement taken a day earlier we considered fully the question of the medical examination of the lst appellant by the doctor on 5th April, 1988, and her failure to complain to him. The trial Judge has very properly observed that the lst appellant had not involved Inspector Onyango in any of the acts of torture. So why had she not complained to him? In fact over a year earlier Inspector Onyango had been quite co-operative in arranging access for the 1st appellant and her relatives into the mortuary to see if they could identify the deceased among the bodies. We would once again observe that the 1st appellant does not claim to have made a statement but had merely signed papers which Inspector Onyango was holding. So according to her she had signed a prepared statement. However, it is clear that the details of her married life with the deceased given in the first half of the charge and caution statement and the prayers that she had arranged for the deceased to change his way of life could not have been obtained by the policemen concerned from any source except from the lst appellant herself. So the lst appellant was not truthful in her claim that she had not made any statement at all. She had made the charge and caution statement and, we are satisfied on our own evaluation, that she had done so voluntarily and of her own free will.

In respect of his grievance that the first appellant was not given an opportunity to decide whether or not to give the statement and further that the charge was not read out to her, Mr Otieno pointed out that in his evidence Inpector Onyango had clearly stated at first that after he had given the 1st appellant a chair to sit in his office he had informed her that he would like to record her statement. We quote below the evidence which Inspector Onyango gave at that time:

> "I then informed her that I would like to record her statement. She accepted to give a statement. Before I recorded her statement I cautioned her that whatever she was going to tell me would be put down and would be given in evidence. During this time we were speaking in English. She accepted to give the whole story in English which she understood very well. After recording her statement, I handed it over to her to read and make any corrections. She read the statement and signed it and I also countersigned. After this statement I made a certificate to certify that she was not threatened when she gave the statement. There was no force or inducement or threat of any nature used against her. I signed and she also signed the certificate."

Then followed an objection to admissibility raised by Mr Otieno during the hearing of which the witness, Inspector Onyango, retired. After having heard the submissions from Mr Otieno and the state counsel Mrs Njogu, the trial Judge over- ruled the objection as being pre-mature. The Inspector then continued with his evidence. It is not clear from the record as to whether Inspector Onyango had remained inside the court room or had moved outside the court room during the objection proceedings. However, we quote below what the Inspector said when he resumed giving his evidence:

> "I recall lst April, 1988, when I recorded a statement from Jane Betty Mwaiseje at about 9.00 am. This was a charge and cautionary statement in relation to the offence of murder. The charge was that on 23rd/24th November, 1986, she murdered Dr Boniface Mwaiseje. I cautioned her. The words I used were 'Do you wish to say anything to the charge? You are not obliged to say anything unless you wish to do so. Whatever you say will be taken down in writing and may be given in evidence.' I conversed with 1st accused in English language. I speak and understand English language well. The lst accused elected to make a statement which I recorded. 1st accused also spoke in English language and I recorded the statement in the same language. After recording it, I gave her to read it which she did. I also invited her to make any additions, omissions or

> alterations. She did not make any alterations. She signed the statement and I also countersigned it. I also made a certificate to the effect that the accused had voluntarily, without threats, promise, inducements given a statement. She signed the certificate and I countersigned it. I did not use any force, threats, or inducements to get the statement. Statement was voluntarily given. This is statement marked MFl II."

Mr Otieno subimitted that it was clear from Inspector Onyango's evidence given prior to the objection proceedings that before the Inspector recorded the cautionary statement he had not informed the lst appellant that she was not obliged to make a statement, without the inclusion of these words the prefatory words that he had used, that is that he had informed her that he would like to record her statement and that before he recorded her statement he had cautioned her that whatever she was going to tell him would be put down and would be given in evidence, merely constituted a warning and not an option. The trial Judge, we note, had considered this omission and following the principles laid down in *Bassan's* case (*Bassan & Wathobia v R* (1961) EACA), had rejected this particular ground. We fully endorse the view expressed by this Court in *Bassan's* case in respect of the Judge's Rules. These are mere administrative directions for the guidance of the police officers and have no force of law. Therefore, a breach of any of these Rules does not automatically result in the exclusion of the statement in question. The admissibility or otherwise of a cautionary statement ultimately rests on the discretion of the judge in the exercise of which the question of prejudice being caused to the accused by the breach is the major factor. In our view, in this case, the learned Judge exercised his discretion correctly.

We now come to the more substantial ground, and that is, that the charge was not read out to the 1st appellant before she was invited to make the statement. We refer to the relevant passages from Inspector Onyango's evidence which we have quoted above. We observe that nowhere has the Inspector said that he read out the charge to the lst appellant. It is true that the charge and caution statement (exhibit 12) commences with the statement of the charge, followed by the caution and then by the certificate to the effect, *inter alia*, that the charge had been heard or had been read over which is signed by the lst appellant. But there is no evidence that the 1st appellant had in fact herself read the charge before she signed the certificate. In the passages which we have quoted above and which formed the whole of the examination in chief of the witness, nowhere is it shown that the charge was read out to the 1st appellant. This, in our view, is a grave omission. The onus is on the prosecution to prove that such a statement was not only made voluntarily but was also made in response to the charge which the accused is expected to face. That onus does not appear from the evidence to have been discharged.

Apart from this omission it, appears that Inspector Onyango's evidence is not quite reliable. We again refer to the second passage from his evidence which we quoted earlier. After telling the Judge that he had recorded a charge and caution statement from the lst appellant in relation to the offence of murder Inspector Onyango had gone on to give the particulars of the charge as being that on 23rd/24th November, 1986, she murdered Dr Boniface Mwaiseje. On this issue we now reproduce below the charge from the charge and caution statement (exhibit 12) which was put to the 1st appellant.

> "I Isaac Onyango an Inspector of Police attached to Kilimani Police Station do charge you Jane Betty Mwaiseje with murder contrary to section 203 as read out with section 204 of the Penal Code."

Then followed the caution.

There are serious omissions in this charge. Neither the name of the person alleged to have been murdered by the lst appellant nor the date nor the place of the offence are given. The charge as drafted in the charge and caution statement is worthless. The discrepancy between the evidence of Inspector Onyango that is disclosed by the actual contents of the charge and the particulars of the charge that the Inspector gave to the Judge in his evidence strongly undermines his credibility as a witness. The defects that we have pointed out above appear to have been over-looked by the trial Judge. In our view the charge and caution statement ought not to have been given any probative value. We propose to ignore it altogether.

The evidence against the 1st appellant is therefore, founded on a confession contained in her enquiry

statement which she had repudiated and was after a trial within a trial properly admitted. The learned trial Judge looked for and found corroboration in the evidence of PW6 Mrs Sharok Firozi Hirji, who became friendly with the lst appellant through her husband PW4 Mr Feroze Murali Hirji who was a friend of both the deceased and the lst appellant- of the latter since 1976 when she was still not married. We have already referred to the incidents which Mrs Hirji (P W 6) related having occurred during the month preceding the tragedy which consisted of the deceased informing the witness on telephone that she was sharpening the knife for the deceased to return home, the burning of the deceased's clothes which he had worn on the previous day from fear of contracting Aids, the swelling on the deceased's forehead caused after being hit by the lst appellant and the attempt by the lst appellant, to hit the deceased with an ashtray. This evidence of PW6 remained uncontroverted and the learned trial Judge accepted that these incidents had happened. The learned trial Judge found corroboration from the above conduct of the lst appellant during the month or so prior to the tragedy. In his submissions before us Mr Otieno named these as isolated incidents. Throwing of the ash-tray, he thought, was a momentary lapse. Such types of incidents had no corroborative value. After due consideration of these incidents we are unable to accept Mr Otieno's view. The witness, PW6, said that after the 1st appellant told her on telephone that she was sharpening a knife to fix her husband, the deceased, when he came home she told her husband to take the deceased home as the wife was annoyed. Her husband complied with the request. PW6 added that because she was worried she, later that day, visited the deceased and the 1st appellant at their house. That is when she observed that the deceased's clothes had been set on fire, the swelling on the deceased's forehead and the incident of the ash - tray. The evidence shows that the 1st appellant clearly had not made an idle threat on the telephone. PW6 had also related how during a conversation towards the end of October, 1986, the 1st appellant had told her that she knew of people who could fix their husbands so that they would be beaten so thoroughly that for a week or two they would not go out at all. It is significant that similar sentiments and intention are also expressed by the 1st appellant in her enquiry statement. The learned trial Judge had also referred to the evidence of PW6 relating to the conduct of the 1st appellant after the disappearance of the deceased in that on 25th November, 1986, by which date the body of the deceased had not yet been found, the lst appellant had displayed a high degree of anxiety in attempting to obtain a loan to enable her embark on a diamond business in Zaire. That disclosed a rather unnatural lack of concern on the part of the lst appellant over the disappearance of her husband. In our view such conduct within about a month or so before the murder and so soon thereafter properly constitutes a corroboration of the enquiry statement and the learned trial Judge had correctly found so and his conviction of the 1st appellant for murder is well-founded. We concur with it.

We now turn to the admissibility or otherwise of the confession statements and the video tape recordings with transcriptions of Daniel, the 3rd appellant, who was arrested first. Superintendent Muiruri (PW3), in consequence of information received on 22nd September, 1987, visited Nairobi Remand Prison on 23rd September, 1987, and confirmed the presence of the 3rd appellant there. By 25th September, 1987, he had arranged for the withdrawal of the criminal charge he was facing. The same day, late in the evening, he deposited the 3rd appellant in the police cells at Kilimani Police Station and the following day, 26th September, 1987, he collected him from the cells and took him to his office where he obtained the enquiry statement (Ex 21) from him at 2.30 pm. Objection to the admissibility of the enquiry statement at the trial was raised on 2 grounds, namely that the caution was administered in a language which the 3rd appellant did not understand and that the statement was obtained by force through beating and threats. After trial within trial the learned Jugde rejected the two grounds of objection and admitted the statement as an exhibit.

In his submssions before us Mr Ramogo for the 3rd appellant abandoned the objection he had raised in the lower court on the question of language and instead made submissions on the following 2 grounds:

1. That there was a possibility that Superintendent Muiruri had himself prepared the statement.

2. The 3rd appellant thumb - printed the enquiry statement on account of beatings and torture he had suffered while in police custody.

As regards the 1st ground about the possibility of Superintendant Muiruri himself having prepared the statement Mr Ramogo gave details of the important events of which the Superintendent already had

information to enable him to prepare a statement for the 3rd appellant to sign.

The Court's attention was drawn to the Court of Appeal Cr Appeal No 170/84 *Joseph Njaramba Karura vs Republic*, Digest, vol 7 p 8 in the 2nd holding of which this Court said that an investigation officer should not record a confession statement by an accused person to avoid any charges of tailoring evidence to support the prosecution case and allegations of use of force upon the accused to extract the confessions. Mr Ramogo's contention was that in the circumstances Superintendent Muiruri was not the proper police officer to have taken the enquiry statement. We must point out here that the judgment in *Njaramba's* appeal which was cited does not clarify whether the appeal court was therein dealing with an enquiry statement obtained under a caution or a charge and caution statement. We would agree that a charge and caution statement, more as a measure of precaution, ought not to be taken by the investigating officer. Another observation we would like to make is that the attention of the Court in *Njaramba's* case was not drawn to the decision on this question, given by the Court of Appeal in *Bassan's* case to which we will now refer in greater detail. The question of enquiry statements and the charge and caution statements was considered at length in the earlier Court of Appeal decisions in *Pyaralal Melaram Bassan and Wathobia s/o Kiembu vs R* (1961) EACA p 521 at pp 533, 534. It was held in *Bassan's* case that the fact that certain passages of the statements made by the appellants were made to the police officers who were investigating officers in the case did not automatically result in the exclusion of those statements from evidence. The Court referred to the following dictum in *Njuguna s/o Kimani and others v R* (5) (1954) 21 EACA 316 and at p 322

> "This Court has more than once said that it is inadvisable, if not improper, for the police officer who was conducting the investigation of a case, to charge a suspect and record his cautioned statement."

The Court then continued:

> "It is to be noted that that dictum relates to the cautioned statement taken upon the charging of a suspect. In the instant case, the appellant was cautioned before making the statement; but the police at that stage was not satisfied with the truth of the story and he was not charged till the following morning."

Then after referring to a passage from *Israeli Kamukoke and others v R* (6) (1956) 23 EACA 521 at p 525 and to the submissions by Mr Brookes, for the Crown, the Court in *Bassan's* case coritinued:

> "We certainly do not think that the Court in *Njuguna's* case (5), intended to lay down a rule of law that a statement recorded by an investigating officer upon charge and caution of a suspect is to be automatically excluded from evidence. Nor do we think that the Court in *Israeli's* case can have intended to say that it is necessarily improper for an investigating officer to take any statement from a suspect. If it did, we must respectfully dissent. There may be suspects in the early stages of an investigation into a case, and it is hardly a practicable proposition that a fresh and independent police officer should be procured to take a statement from each."

We respectfully agree with the above conclusions of this Court in *Bassan's* case. That answers Mr Ramogo's submissions based on the decision in *Njaramba's* case. We do not find anything improper in Superintendent Muiruri's recording the enquiry statement from the 3rd appellant, and we think that the remarks in *Njaramba's* case must be confined to a charge and cautionary statement.

Regarding Mr Ramogo's submissions that there was a possibility of the 3rd appellant having been forced to thumb-print a prepared statement all we can say is that this particular allegation was never put to the Superintendent during his cross-examination nor was it canvassed before the trial Judge. In any case from where could the Superintendent have obtained the name of and information about the 2nd appellant so as to have incorporated him as a co-participant? The Superintendent said in his evidence that it was after he had recorded the enquiry statement from the 3rd appellant that he came to learn of the name of the 2nd appellant and immediately started looking for him and then traced him at the Kamiti Maximum Security Prison. This is a baseless and spurious allegation and we reject it. In regard to the allegation of beatings

and torture the 3rd appellant in his unsworn statement during the trial within trial said that he was informed on 24th September, 1987, in Kibera Court, that the charge against him was going to be withdrawn. He was then taken to Kilimani Police Station where he spent the night in cells. The next morning he was taken to the office of Superintendent Muiruri where he saw TVs, videos, and amplifiers. On instructions of the Superintendent he was taken by CIP Njenga and 3 other officers to Buru Buru Police Station. On the way three officers including IP Motokaa and IP Cheke had joined the group. Here when the 3rd appellant disclaimed any knowledge about the TV, video and the 2 amplifiers he was taken to the forest where he was whipped on the buttocks and shoulders with tyre strips. When Superintendent Muiruri arrived all that they wanted to know was from where he had obtained those items. Later at Kilimani Police Station he was told by Superintendent Muiruri that if he wanted the beatings to stop then he should sign the papers which he produced but which were not read out to him. He thumb-printed the papers to escape further beatings.

It is significant that what the 3rd appellant was at pains to stress was that the police, including Superintendent Muiruri were only concerned to obtain some admission from him with regard to the stealing of televisions, videos and the two amplifiers and the police had tried to obtain that admission through beatings. There is no mention of any enquiry into the death of the deceased in the unsworn statement. Clearly, the trial Judge had no evidence before him even to suggest that the enquiry statement had been obtained under duress or through beatings. We also observe that Dr Nganga who examined the 3rd appellant on 14th October, 1987, had found no sign of any injuries on him. He had also added that the 3rd appellant had made no complaint to him. Superintendent Muiruri had denied that the 3rd appellant had been subjected to any ill treatment or threats and had emphatically maintained that the enquiry statement had been made voluntarily by the 3rd appellant. The 3rd appellant came into his custody from remand prison late in the evening of 25th September, 1987, when he was put in the cells at Kilimani Police Station. The next day on 26th September, 1987 at 2.30 pm the 3rd appellant gave the enquiry statement. There was no unreasonable length of time spent in police custody for a systematic and sustained physical ill-treatment to be meted out as claimed by the 3rd appellant. In our view, the trial Judge made no error in finding that the enquiry statement had been made voluntarily and in ruling it admissible. We therefore reject the ground of appeal directed against the admissibility of the 3rd appellant's enquiry statement. At this stage, it would be convenient to deal with the ground of appeal complaining about the admissibility of the enquiry statement obtained from the 2nd appellant whose connection with the murder was clearly traced from the 3rd appellant's enquiry statement.

Superintendent Muiruri said that after obtaining the enquiry statement from the 3rd appellant on 26th September, 1987, he started looking for the 2nd appellant (who had been mentioned prominently by the 3rd appellant in his enquiry statement). On 27th September, 1987, he located the 2nd appellant at the Kamiti Maximum Security Prison where he was held in connection with two robbery cases. After arranging for the withdrawal of those cases, Superintendent Muiruri arrested the 2nd appellant in the morning hours of 1st October, 1987, and brought him to Kilimani Police Station. He took the enquiry statement from this appellant the same afternoon at 2.00 pm. Objection to the admissibility of this statement was raised at the trial but it was admitted after a trial within trial. The grounds of objection to its admissibility in the lower court were the same ones which were argued before us and were as follows:

1. There was no evidence that a caution in Kiswahili was administered.

2. Superintendent Muiruri was not the proper person to have obtained the enquiry statement.

3. Signature of the 2nd appellant had been obtained through fear instilled by systematic beatings and torture.

In respect of the claim that no caution was administered in Kiswahili, Mr Ramogo drew attention to the original statement in Kiswahili and pointed out that the caution was recorded in English. No translation in Kiswahili had been recorded. The certificate at the end of the statement which the appellant had allegedly signed was also in English. There was therefore no acceptable evidence that either the caution or the certificate had ever been translated to the appellant.

At first sight there appears to be substantial validity in Mr Ramogo's submissions. But when the evidence produced during the trial within trial is considered in its totality, Mr Ramogo's submissions appear to lose their sting. Superintendent Muiruri in his evidence, was emphatic that he had translated the caution to the appellant before he made the statement and had also done the same in respect of the certificate after he had read back the statement in Kiswahili. Surprisingly, however, the 2nd appellant, in his lengthy unsworn statement in Court, made no effort at all to rebut the evidence of the Superintendent, that he had translated the caution and the certificate. We do not see any reason to doubt the evidence of the Superintendent on this issue which, like the learned trial Judge, we accept.

But we take this opportunity of observing that it would be advisable for the caution or the charge and caution to be incorporated in the statement in the language with which the accused is well conversant and that the certificate at the end which bears his signature should likewise be made in the same language. They can later be translated into English with the accused's statement. As regards the complaint about Superintendent Muiruri taking the enquiry statement the submissions made by Mr Ramogo were the same as he made in respect of the 3rd appellant. We found no merit in any of the submissions and the same applies to the case of the second appellant. The defence claim that the statement was already prepared by the Superintendent for the 2nd appellant is further belied by the fact that the first 2 paragraphs of the statement contain nothing but details of the appellant's childhood and education - details which could not have been known to the Superintendent, and therefore, must have been given by the 2nd appellant himself. There is no substance in this complaint.

Coming now to the claim that the 2nd appellant signed documents presented to him on account of beatings and torture that had been inflicted on him, Mr Ramogo's main contention was that despite a detailed account of beatings and torture given by the 2nd appellant, the trial Judge had neither considered this issue nor made any finding in respect thereof. We are surprised at Mr Ramogo's submissions on this issue because the trial Judge, in our view, had no cause to go into the allegations of ill treatment. According to his lengthy unsworn statement in the trial within trial what the 2nd appellant had claimed was that after he was released from the Magistrate's Court under section 87 (a) (of the Criminal Procedure Code) on 1st October, 1987, he was arrested by Superintendent Muiruri and then kept in the police cells at Kilimani Police Station until 14th October, 1987, when he was taken to Dr Nganga. The 2nd appellant did not say anywhere in his evidence that he was ill-treated in any way during this period between 1st October, 1987, and 14th October, 1987. So it is clear that he was not physically ill-treated at all during this period and that fact was confirmed by the 2nd appellant when he stated during his unsworn statement in Court that when Dr Nganga asked him if he had any injuries he told him that he had none. The enquiry statement was taken on lst October, 1987, at 2.30 pm and so clearly had been made by the 2nd appellant without any fear having been generated by any ill-treatment. According to the 2nd appellant torture and beatings commenced immediately after he left the doctor on 14th October, 1987. That ill-treatment, if true, took place almost 2 weeks after the enquiry statement had been recorded and was irrelevant. The Judge did not err and infact was fully justified in completely ignoring this baseless allegation. There is no substance in the ground of appeal against admissibility of the 2nd appellant's enquiry statement which, on our own evaluation of the evidence, was properly admitted. The next stage in the investigations was another enquiry statement obtained by Superintendent Muiruri separately from both the 3rd and the 2nd appellants in the form of video tape recordings and the transcripts of the conversation in the form of question and answer that took place between the Superitendent and the appellant concerned at the scene of murder and the scenes where the car and the deceased's body were disposed of. It will be recalled that of the three appellants it was the 3rd appellant who was arrested first and who, therefore, first gave his enquiry statement on 27th September, 1987. Superitendent Muiruri said that the 3rd appellant when giving his enquiry statement had stated that he would be willing to show the scenes. We note that near the end of this enquiry statement the 3rd appellant had in fact said that he could identify the house from which they collected the car in Nairobi West. He could also recall where the lady's house was, where the deceased's body was burnt, and where the car was burnt.

Superintendent Muiruri continued that on 30th September, 1987, he sent for the 3rd appellant from the police cells and after ascertaining his willingness to lead the Superintendent to various scenes and to be video- taped, he arranged with Senior Superintendent Kariuki to accompany them for the purposes of video taping and recording the conversation. Objection was raised to the admissibility of the video tape

recording and the transcripts. A trial within trial followed. Objections raised on the grounds that caution was not administered properly and that the appellant had accompanied the Superintendent and taken part in the conversation because of beatings and torture to which he had been subjected were rejected by the learned Judge. He admitted the video tapes with the recorded conversation and the transcripts of the conversation. Admissibility of the video tape recording was a ground of appeal before us and both Mr Otieno and Mr Ramogo addressed us. Their submissions may be summarised as follows:

1. Superintendent Muiruri was not the proper person to have conducted the exercise.

2. No caution was administered at the police station before leaving to visit the scenes. Video taping should have started at the police station.

3.No proper caution was administered at the scene.

4. There was no proper evidence to show that video tape recording equipment was serviceable and reliable.

5. There was no certificate from the appellant at the end of the recording as is the case in an enquiry statement to show his voluntariness.

6. Section 231(2) (c) of the Criminal Procedure Code was not complied with during committal proceedings.

Before we commence to deal with the rest of the submissions directed against the admission of the video tape recording it would be appropriate to deal with the complaint regarding non-compliance with the provisions of section 231 of the Criminal Procedure Code as that affects evidence relating to video tape recording in respect of both 3rd and 2nd appellants. Section 231 has prescribed requirements relating to the committal documents which have to be complied with not less than 14 days before the date fixed for committal proceedings. The crux of the submissions by Mr Ramogo on behalf of the two appellants was that the video tape recordings did not form part of the committal documents as required by section 231(2) (c). As a result the defence was faced with evidence which it had not had any opportunity to see and study before-hand. That went contrary to the spirit of sub-sections 1 and 2 (c) of section 231 which was to give the defence a minimum of 14 days to study documents relating to all the evidence that was intended to be called. Mr Ramogo conceded the validity of the manner in which the transcript of the conversation recorded during video taping was introduced after service of notice during the trial under section 301 (1) of Criminal Procedure Code. In his view as there was no provision in section 231 of the Criminal Procedure Code which allowed inclusion of video tapes in comittal documents the same should not have been made to be produced as evidence. In any case, arrangement should have been made to show the defence advocates the video tapes before the committal proceedings.

It is true that there is no specific mention in section 231 (2) (c) of video tapes. The reason for that is clear because the use of video tapes in police investigations is a recent innovation in Kenya while section 231 of Criminal Procedure Code was introduced in 1982. But in our view, for that reason alone evidence recorded on video tape, or in any other form not in use so far, cannot be taken to have been intended to be excluded by the section. The real intention is to give the defence adequate notice of the evidence that an accused person is expected to face. The Courts cannot be blind to new techniques being developed to assist in investigations in order for the truth to be arrived at.

We notice that during the trial within trial held to determine the admisibility of the video tapes the State had offered to play the video tapes for the benefit of the defence. Instead of accepting that offer at that stage the defence continued to contest their admissibility on, *inter alia*, this particular ground of non - compliance with section 231 of Criminal Procedure Code. In fact one would have expected the defence to apply to be shown the video tapes a day earlier when the notice of additional evidence in respect of the transcript of the conversation during video taping was served. Being mindful of all the circumstances and the fact that the State made an offer to play the video tapes for the benefit of the defence we are satisfied that no prejudice was caused to the appellants on account of non-inclusion of the video tapes in the list of

exhibits as required under section 231 (2) (c) of the Criminal Procedure Code. Having rejected this submission we shall now proceed with the rest of the complaints as summarised earlier. We would point out here that the video tapes were in fact shown in Court for the benefit of the assessors, the appellants and their advocates.

We have earlier dealt at length with the question of whether, in view of Superintendent Muiruri's knowledge of all the facts of the crime, it was proper for him to have participated in the video tape recording exercise.

The 3rd appellant had claimed in his unsworn statement during the trial within trial that it was Superintendent Muiruri who had taken him to the various scenes where he had admitted what was put to him by the Superintendent. The submission on behalf of the appellant was that he had neither offered to lead nor pointed out the various scenes, and that the Superintendent had led him to those places where as a result of beatings and threats which had preceded the exercise the appellant made the desired admissions. We have earlier made clear our view that, barring exceptional circumstances, there is nothing improper in the investigating officer in the course of his investigations taking inquiry statements even if he has come to learn of certain facts relating to the crime. In fact in this case Superintendent Muiruri, as the investigating officer, was the most suitable officer to have conducted the exercise as he alone knew what questions to ask so that the answers were confined to relevant matters only. Having viewed the video tapes of the visits and listened to the recorded conversation and having perused the transcripts, it is abundantly evident that the Superintendent had at the various scenes merely asked the 3rd appellant to point out and describe the details of the event, and the appellant did that. There is nothing to suggest either in the tape or the cassette that the Superintendent had asked any incriminating or leading questions in order to extract admissions.

As regards the complaints that no proper caution was administered, that there was no proof that the video tape recording equipment was in good working order and absence of a statement from the appellant at the conclusion of the video tape recording certifying the voluntariness of the exercise, we have carefully considered them but do not find any merit in any of them. It is true that the caution that is recorded is not a complete caution but Senior Superintendent Kariuki who was working the video tape recording equipment explained that the first part of the caution did not appear in the recording because, although it was he who was to give the signal for the commencement of the exercise, Muiruri started administering the caution without waiting for Senior Superintendent Kariuki's signal to start. He had not realised at the time that Superintendent Muiruri had started recording. Thus the first part of the caution was missed from the recording. But he confirmed Superintendent Muiruri's evidence that a proper caution was administered. In any case it stands to reason that an experienced police officer knowing that the proceedings are being video taped and recorded will not take the risk of administering part of the caution only and not administer a full and proper caution. We shall revert to the aspect of video - taping later on in the judgment.

As to the serviceability and reliability of the equipment, Senior Superintendent Kariuki stated that his equipment was in good working order. There was nothing in the video tapes and the recordings that were played to us to suggest that the same were defective or unreliable. The learned Judge was satisfied, and so are we, that the video tape recording equipment was in a good working condition. As regards the absence of a certificate from the appellant as to the voluntariness of the video tape recording we accept the explanation given by Superintendent Muiruri during cross-examination that the video tape was not played back and the transcript not read back immediately because it took time to get both ready for playing or reading back.

Coming now to the claim that no caution was administered at the police station before the party left to visit the various scenes, Superintendent Muiruri said that the 3rd appellant, during the recording of the enquiry statement from him, in answer to his question, had expressed his willingness to point out the scenes. On 30th September, 1987, after he was called from the police cells, the 3rd appellant, on being asked stated that he had no objection to being video-taped. He was shown the equipment. The 3rd appellant then said that he would start at Ngong Road and then led the party there. Superintendent Muiruri added that at the house he administered the caution before the 3rd appellant explained where they

were. It was only during cross-examination that he said that before showing the equipment and leaving for Ngong Road he administared a caution which was verbal. He conceded that it was not so reflected in the further statement which he made for which he gave a notice for additional evidence. Superintendent Kariuki, however, said that no caution was administered in his presence at the police station. The evidence, therefore, is not satisfactory to show that a caution was administered to the appellant at the police station before the party left for Ngong Road. On the other hand, it is recorded in the enquiry statement of the appellant taken on 26th September, 1987, (Ex 21), that he had stated that he could identify the house in Nairobi West from which they collected the car, the lady's house and the scenes where the body of the deceased and the car were burnt. Superintendent Muiruri's evidence was that when the 3rd appellant was brought to him from the cells at the police station on 30th September, 1987, the 3rd appellant had raised no objection to being video- taped or to his leading and pointing out to the police the various scenes related to the crime.

The main objection raised on behalf of the appellant is that in the absence of caution at the police station, the 3rd appellant was not made aware of the fact that whatever was going to be video-taped could be produced in evidence. It amounted to obtaining a video-taped recording at the scenes through trickery. However, this criticism loses its validity when it is viewed against the following facts:

1. That in an enquiry statement recorded only 4 days earlier under a caution the appellant had expressed his willingness to point out the various scenes.

2. Before the party left the police station the appellant, though not having been cautioned, had raised no objection to being video-taped or to his leading and pointing out to the police the various scenes related to the crime.

3. Finally a caution was administered before the actual commencement of video taping exercise at Ngong Road. The appellant had the option of refusing, even at that stage, the exercise to proceed any further.

It is clear that the 3rd appellant, at the time the party left the police station, was under no misapprehension at all about the true import of the whole exercise that was to involve video tape recording. But we agree with the view that it would be desirable not only to caution an accused person but also to have the caution video-tape-recorded, before leaving the police station for such an exercise. There cannot be any hard and fast rules about this. A caution was administered to the 3rd appellant at the house. If it was Superintendant Muiruri who had led the 3rd appellant to the house, then one would expect that after the Superintendant administered the cautions the 3rd appellant would immediately protest that he knew nothing about the house and he would not participate in the exercise. In this case, however, we are satisfied that no prejudice was caused to the 3rd appellant by the omission to administer a caution at the police station before the party left for the scenes.

We now come to the video tape recording made of the 2nd appellant's visits to the various scenes and the accompanying conversation. Superintendent Muiruri said in his evidence that during the course of his making the enquiry statement on 1st October, 1987, at 2.30 pm the 2nd appellant had stated that he could recall where the lady's house was, and the scenes where the deceased's body and the car were burnt, and that he could also point out the house where the lady's car was hidden. The next day, 2nd October, 1987, he sent for the 2nd appellant who re-affirmed his willingness to lead the Superintendent to the various scenes related to the crime and also that he had no objection to the proceedings being video taped. This according to the evidence of Senior Superintendent Kariuki must have, been sometime before 11.40 am. Superintendent Muiruri continued that after the arrival of the equipment and before they left police station for Ngong Road he administered a caution to the 2nd appellant in Kiswahili language which the appellant understood. This was not recorded. It was a verbal caution. No threat or torture was used nor any promise held out. The 2nd appellant voluntarily led the police with the video tape recording equipment to the various scenes. Before the commencement of the exercise at the house off Ngong Road he again administered the caution which was recorded in the video tape.

Mr Ramogo submitted as follows on his ground of appeal related to the admission of video tape recording

as evidence against the 2nd appellant:

> 1. That the appellant had been tortured before he was taken out on 2nd October, 1987.
>
> 2. Too many policemen were present.
>
> 3. The 2nd appellant was not adequately cautioned before the recording of the conversation commenced.
>
> 4. It was improper for the investigating officer to have accompanied as he already knew the various sites. This particular issue was raised and dealt with by us when we were considering the question of admissibility in the case of the 3rd appellant. Facts and submissions are no different now and our views that were expressed earlier apply in the case of the 2nd appellant also.

As regards the allegations of torture we have already made our finding on that issue when we dealt with the enquiry statement. In fact during the trial within trial held to decide the admissibility of the video tape recording the 2nd appellant did not mention any torture prior to 2nd October, 1987. Nor did he claim that the presence of the policemen had anything to dowith his taking part in the video tape recording exercise. As regards the third complaint that the appellant was not adequately cautioned and the omission of recording of the caution at the police station we have already made our view clear over the desirability of recording or video taping the caution at the police station. The learned judge after trial within trial was satisfied that the conversation was voluntary and so admitted the transcription in evidence.

It is true that in the caution that was administered at the house off Ngong Road it was not made clear to the appellant what crime the Superintendent was enquiring into or what the caution was about. We give below the caution that is recorded as having been administered.

> "I caution you that you are not obliged to say anything but whatever you say may be used in evidence."

That caution clearly is incomplete because it does not by itself make the appellant aware of what the whole exercise is about or whether the Superintendent is enquiring into any offence and if so what offence. The fear of the defence that the 2nd appellant's participation in the exercise and the conversation was induced through trickery thereby becomes real. But in the circumstances of this case such a fear is unfounded because less than 24 hours earlier that is on the preceding day at 2.30 pm the 2nd appellant had been properly cautioned at the time he made the enquiry statement and he was made well aware of the offence that the Superintendent was enquiring into. During that enquiry statement this appellant had stated to the Superintendent that he would be able to identify and point out the various scenes relating to the offence. When he was called from the cells the following morning the Superintendent asked him if he had any objection to taking him, the Superintendent, to the various scenes he had mentioned in his enquiry statement the preceding day. There is no satisfactory evidence that any caution had first been administered. But it is clear that when the 2nd appellant left the police station he was well aware of what the adventure was about. So factually the fear that the 2nd appellant might have been induced into participating in this exercise through trickery turns out to be baseless. In our view no prejudice was caused to the 2nd appellant by the omission of the words relating to what the Superintendent was enquiring about.

As to whether it was proper for Superintendent Muiruri who knew of where the various scenes were, to have accompanied the party we have already expressed our views on this issue when the same was raised in reference to the question of admissibility of video tape recording in the case of the third appellant. The facts are the same and our views are the same. The video tape recording and its transcription were, in our view, properly admitted in evidence. The second appellant had voluntarily agreed to take part in it being well aware of what the exercise was about. There was no trickery or deception used. The trial Judge did not err in admitting the video tape or transcription.

We now come to the next stage of the prosecution evidence which is the charge and caution statements

obtained from the third and the second appellants. Both made charge and caution statements on 14th October, 1987 at CID Kilimani office, the second appellant at 9.00 am to Inspector Joel Mutukao (PW26) and the third appellant at 4.00 pm to Inspector Levi Wafula (PW24). Objections were raised to the admissibility of both the charge and caution statements. A trial within trial in respect of each caution statement followed. Both were admitted as having been made voluntarily without any threat, torture or inducement.

The objection before the trial Court in respect of the charge and caution statement made by the 2nd appellant was based on the ground that it was a prepared statement which the 2nd appellant was forced to sign after he was tortured by policemen whom he named including Chief Inspector J Mutukao and who were not called to give evidence. There was no satisfactory evidence that the charge and caution were translated in Kiswahili to the 2nd appellant and the length of his period in custody before the caution statement was taken. Mr Ramogo, however, conceded that during cross-examination allegations of beating or torture made against Chief Inspector J Mutukao were never put to him. Before us, however, Mr Ramogo merely submitted that the 2nd appellant had been in custody for 14 days before his charge and caution statement was taken and that the trial Judge had not made any specific finding with regard to the allegations of beating and torture. He added that the charge and caution statement was taken on 14th October, 1987, yet the 2nd appellant was taken to Court on 22nd October, 1987, which justifiably gave rise to suspicion that this delay of 8 days was deliberate to give time for injuries to heal before he was taken to Court.

There is no merit in these submissions although we strongly deplore the length of the period that the appellant was kept in custody after his charge and caution statement had been recorded. The trial Judge had carefully considered the objections that were raised before him. As regards the length of the period in custody before the cautionary statement was taken on 14th October, 1987, and the allegations of torture and beating, both of these complaints appear to be irrelevant because the 2nd appellant in his unsworn statement during the trial within trial had emphatically stated that from 1st October, 1987, when he was taken into police custody up to 14th October, 1987, he was merely kept in cells. He was not ill-treated in any manner. So the allegation with regard to length of period in custody becomes irrelevant. The charge and caution statement was taken at 9.00 am on 14th October, 1987. So all the torture and beatings that had been inflicted, if at all, must have happened after the caution statement had been recorded. So that allegation also becomes irrelevant. The trial Judge, in our view, had quite properly decided to ignore the allegations of torture and beating which were, so obviously, irrelevant. The trial Judge made no error, in our view, in admitting the charge and caution statement of the 2nd appellant.

The admissibility of the charge and caution statement of the 3rd appellant was challenged in the trial Court on the following grounds:

1. The caution was not administered in Kiswahili.

2. The contradiction between the evidence of Inspector Wafula and Police Constable Kangethe as to who brought the charge sheet to the Inspector had not been properly appreciated by the trial Judge.

3. The 3rd appellant had been subjected to beatings and torture.

Before us Mr Ramogo did not take up separately the point that the caution was not administered in Kiswahili. But he strongly argued that the learned Judge had misapprehended the import of the contradiction between the evidence of Inspector Wafula and Police Constable Kangethe. Mr Ramogo's contention was that if the Inspector had lied in a minor matter of that nature then it was quite possible that he could have also lied when he said that he had cautioned the appellant in Kiswahili-otherwise why was the caution that was attached to the statement made in Kiswahili but was written out in English only? Nor was it indicated in the statutory statement of the Inspector that he had cautioned the appellant in Kiswahili

The learned Judge, however, rejected the evidence of Police Constable Kangethe on this issue altogether because he said that the defence had objected to its admission on the ground that this particular part of his

evidence was not recorded in his statement which formed part of the committal documents and no notice of additional evidence under section 301(1) had been given by the prosecution. As no ground of appeal has been directed against rejection of this part of his evidence we will say no more on the matter except to make the observation that the contradiction referred to was of a very minor nature over a matter of hardly any importance. The credibility of a witness cannot be judged by one instance of such a minor contradiction. The learned trial Judge had found Inspector Wafula a credible witness and had accepted his evidence as the truth. We do not see any reason to differ from his view.

On the allegations of beating and torture, Mr Ramogo submitted that as the charge and caution statement was recorded on 14th October, 1987 at 4.00 pm then clearly he must have been examined by the doctor during sometime earlier than that. The beatings must have been inflicted after the 3rd appellant had been examined by the doctor as was claimed by the appellant in his unsworn statement in Court during the trial within trial. Why was the appellant not taken to the doctor the next day? The learned trial Judge considered this issue and very properly observed that the 3rd appellant had been consistently alleging that he was being beaten and tortured in relation to theft of some goods (video, radio, TV and other musical instruments). So clearly the beating and torture had no relation to this offence of murder. As regards the allegation by the 3rd appellant in his unsworn statement during the trial within trial that after the beatings he was taken to Inspector Wafula who removed some prepared papers from the cupboard and asked him to sign which he did on the urging of the other policemen to do so quickly, we observe that this allegation was never put to Inspector Wafula during the trial within trial when he gave his evidence. There is no merit in any of the complaints relating to the admission of the charge and caution statement of the 3rd appellant. We are satisfied that the trial Judge admitted the charge and caution statement properly.

At this stage we would like to observe that when a doctor medically examines a witness or a suspect, he must make a note in his report not only of the date but also of the time of the medical examination. That is of great assistance to the Courts when allegations are made that the ill-treatment, or torture was administered after the medical examination.

The learned Judge was alive to the fact that the three confession statements *viz*: the enquiry statements and the charge and caution statements by both appellants No 2 and No 3 were repudiated and needed corroboration before a conviction could be based on either or both of the said statements made by the appellant concerned, unless the Court was satisfied that in all the circumstances they were true. He did not find any corroboration of the repudiated confession statements. With regard to the video tape recordings and transcriptions his view was that the video and its transcripts constituted continuous acts of the enquiry statements which had been recorded earlier and thereby not only showed that the statements were voluntary but also reinforced and strengthened their truthfulness. Before dealing with the confession statements and the evidential value of the video tape recordings and their transcriptions, we will first consider whether or not there is any independent corroboration of any of the confession statements.

In his enquiry statement made on 26th September, 1987, at 2.30 pm the 3rd appellant had stated that following a dispute between him and John Aggrey over the proceeds from the sale of the engine of the blue Datsun in question, John had taken out a knife from his pocket and cut him at the left side of his chest and that he still had the scar. During the video taping he had pointed out the scar to the Superintendent and that had come out clearly on the TV screen when the video tape was shown to this Court during the hearing of this appeal. In his unsworn statement made in his defence the 3rd appellant made no mention of this piece of prosecution evidence. He must have heard his enquiry statement when it was read out in Court for the benefit of the Court and the assessors. Likewise, he must have also seen the video cassette and heard the recorded conversation when it was played in Court. The fact that he actually has that scar on the left side of his chest is corroboration of what he said about it and the incident his enquiry statement was “John Aggrey” but it is clear from the extent of involvement of John Aggrey as indicated in the 3rd appellant’s enquiry statement and that of the 2nd appellant, John Lungazo Mugoja, as shown in the second appellant’s enquiry statement made on 1st October, 1987, at 2.30 pm (Ex 22) that Jonh Aggrey and John Lungazo Mugoja are one and the same person. The corroboration provided by this fact thereby becomes stronger.

The learned Judge had disregarded the evidence relating to the foot pump as having any corroborative

value because the assessors had said that as the owner of the vehicle had not known anything about the foot- pump it was possible that (qoute) “it might have been obtained elsewhere”. He had agreed with the view of the assessors. With respect the importance of the evidence relating to the foot-pump is not confined merely to whether the owner of the Datsun was able to identify the foot-pump as his or that he knew about it. It is true that had he done so it would have made the prosecution task very much easier. But in our view a careful consideration of this evidence does show that its corroborative value is not entirely lost. This is what the 3rd appellant said in his enquiry statement made on 26th September, 1987, (Ex 21) with regard to the foot-pump:

> “I would like to add that when we were going to Kawangware from Nairobi West, I found a pressure pump blue in colour in the car of the man we had killed and I took it without telling my friends and I sold it to Kibera and his employee at a price of Kshs 70.00.”

The police ofcourse had no knowledge of the existence of this foot-pump. But acting on this information received from the enquiry statement they went to Kibera’s Bar at Kawagware and recovered the foot-pump from there, clearly hoping that the owner of the car, Dr Joseph Alloys Ndekezia (PW25), might be able to identify it. The fact that PW25 did not know anything about this foot-pump does not render this evidence worthless because the car had not been in his possession since 17th November, 1986, on which day he had handed over the possession of the car to the deceased for safe-keeping. For one week before his murder the car had been in the custody of the deceased who, the evidence is, used it for his own purposes. But it was the 3rd appellant who said in his enquiry statement that he had picked the foot-pump from inside that car after the murder.

When concluding his unsworn statement in Court made in his defence this is what the 3rd appellant said:

> “I do not know the foot-pump Muiruri said he collected. There is no evidence to show that the pump came from the deceased.”

The 3rd appellant’s claim in Court that he did not know about the foot-pump that Superintendent Muiruri said he had collected is completely demolished by the evidence of PW14 Mr John Kibera Njoroge, the bar owner in Kawangware, who gave a detailed account of how sometimes in February or March, 1987, the 3rd appellant, whom he identified, and who he said, was one of his regular customers asked him for Shs 70/- to cover for drinks with his friends and for bus fare and left the foot-pump (Ex 8) with him by way of security. In September, 1987, policemen came and took away the foot - pump. PW14’s evidence establishes that it was the 3rd appellant who had left the foot-pump with him. That is independent evidence which corroborates what the 3rd appellant said in his enquiry statement as to what he did with the foot-pump. That corroboration gains significance when considered in light of the rest of the account that the 3rd appellant gave as to where he got the foot-pump from.

In our view these two pieces of evidence which relate to the scar of the injury on the 3rd appallent’s chest and to the foot-pump provide independent corroboration of sound value to the enquiry statement of the 3rd appellant which the learned Judge ought not to have by-passed in the case of the scar and rejceted in the case of the foot-pump so lightly.

We now come to the final stage of our own evaluation of the evidence and that is the evidential value of the video tape recording. Video tape recording is a process whereby an event or a course of events is filmed on a video tape and simultanously the conversation that took place relating to the event or events during the filming is tape-recorded. Both the video tape and the tape-recording are synchronised with the result that when the video tape is screened or played the viewer can see the event as well as hear the conversation that was taking place during the happening of the event. As far as tape recording alone is concerned it is well-established that the tape-recording together with its transcription is admissible in evidence provided that a proper foundation for its reception has been laid. In *Reg Vs Raojibhai Patel & Another* (1956), 23 EACA 536 where the question of tape recordings, as evidence, was taken before the Court of Appeal (O’Connor CJ, De Lestang & Edmunds JJ) on a case stated as the magistrate who dealt with the case in the lower court had decided that a tape recording was inadmissible, the Court of Appeal held that “Where a proper foundation had been laid such evidence (recorder, recordings and

transcriptions) is admissible and a recording may be played back in Court."

And the head note in *R vs Maqsud Ali, R v Ashiq Hussein* (1965), 2 All ER on p 464 commences with the following passage:

> "A tape recording is admissible in evidence provided the accuracy of the recording can be proved and the voices recorded can be properly identified and that the evidence is relevant and otherwise admisible. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. There can be no question of laying down any exhaustive set of rules by which the admissibility of such evidence should be judged.
>
> Provided that the jury are guided by what they hear themselves from the tape recording and on that they base their ultimate decision, there is no objection to a copy of a transcript of a tape recording, properly proved, being put before them."

The above instances of tape-recording may be likened to eavesdropping as no caution in such cases is administered. More often than not tape-recording is employed in pursuance of an exercise to trap a suspect.

Video tape recording on the other hand is of the nature of an enquiry statement and, to be of a good evidential value, the exercise should be preceded by a caution to ensure that the accused knows what the exercise is all about and its likely consequences.

We think it would be a great loss to the administration of justice if our Courts were to rule out the use and appliation of modern equipments made available to mankind through scientific advancement. Such equipment, however, are liable to be misused and before admitting evidence obtained by their use, the trial Court must be satisfied beyond any reasonable doubt that such evidence was properly obtained and that no prejudice was occasioned to the accused person by the manner of their use. So that if video-taping is to be carried out, then the officer doing it must, at the very commencement thereof, not only caution the accused about what is involved in the process but also that the accused must be asked whether or not he wishes to paticipate in the process. It must be made clear to him that he has the right to refuse to participate and, needless to say, all this must be video-taped so that in deciding on whether or not to admit such evidence, the trial Court would have before it not only the visual picture of the accused but also his voice before the commencement of the exercise. Video-taping all the aspects of the matter considered relevant and important to the investigation may then follow. Unlike any extra-judicial statement which is hand-recorded and is always read back for any additions, deletions or corrections, it is not feasible for the video-tape to be re-played immediately for that purpose. But the accused still must sign a certificate as to the voluntary nature of his participation in the exercise and if possible, he should be video- taped doing so. If all these precautions are taken then there ought to be no reason to exclude such evidence as being substantial in itself in relation to the facts disclosed in the video tape. However, at the end of the day, the trial Judge retains the absolute discretion to admit or reject such evidence.

In the instant case at the commencement of the exercise in the case of each of the appellants at the scene, the appellant concerned was given the normal caution which warned that he was not obliged to say anything but whatever he said maybe used in evidence. The learned trial Judge who conducted separate trials within the trial on the question of admissibility of the video tape recording was satisfied, and so are we, that the equipment was reliable and that both appellants paticipated in the exercise voluntarily and further that neither was under any deception or misapprehension about the nature and purpose of exercise.

The evidential value of such a video tape recording in our view would clearly be not only higher than an ordinary enquiry statement but would also be virtually unimpeachable. To start with, there is a permanent photographic record in the shape of an action film. Then it also becomes easier for the Court to be able to discern from the film whether the verbal responses or physical actions such as pointing out at the various scenes were voluntary or whether they aroused any suspicion of being under visible or invisible duress. Finally, in the instant case, this exercise had involved a voluntary act of the apellant offering to show the various scenes where the different parts of the crime were committed *viz*: the house of the deceased as the

place where the killing was done, the place where the deceased's body was dumped and set alight, and the place where the blue Datsun car was burnt - off the main road from where it could not be seen. The learned trial Judge had found that the video had merely reinforced and strengthened the confessions and had supported the prosecution case that the confessions were not only voluntary but were true. But, in our view, he should have gone a step further and found corroborative value in the video-tapes. Any tampering with a video-film is virtually ruled out. Any attempt to do so would easily ruin the synchronisation with the sound-recording and would be detected without any difficulty.

Having said that much on the evidential value of video tape recording, we come back to the approach adopted by the trial Judge. His approach, in our view, was more in favour of the appellants. No prejudice was thereby caused to the appellant. In his view the confessions, though repudiated, were voluntary and were also true. On our own evaluation of the whole of the evidence and particularly of the evidence relating to the enquiry statements, charge and caution statements and the video tape recording, we see no reason to differ from his conclusions. However, we observe that, in our view, the evidence supplied by the video tape recording corroborated the repudiated confessions of both the 2nd and the 3rd appellants. And, as we have already pointed out, there was further corroboration of the 3rd appellant's confessions in the shape of the scar on the left side of his breast and in the evidence relating to the foot-pump.

As regards the 1st appellant, we dealt with her appeal earlier and found ourselves in concurrence with the trial Judge over his findings in respect of the confession contained in her statement made under enquiry and the independent corroborative evidence.

Finally, our attention was drawn to the finding by the Judge that death had been caused by strangulation inside the house whereas the medical evidence (PW13), based on the presence of smoke along the trachea of the deceased, was that death was caused by asphyxia with shock due to severe burning of the body.

The advocates for the appellants termed the discrepancy as being serious. In our view, nothing revolves round this discrepancy. The intention of the appellants was to cause death. It matters not whether it was caused by strangulation or by burning. Death was caused by unlawful acts committed with malice aforethought. There is no merit in this submission. We find the convictions of each of the three appellants well-founded and safe and we dismiss the appeal of each of them. Those are our orders.

Dated and delivered at Nairobi this 28th day of October, 1992.

J.R.O MASIME

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JUDGE OF APPEAL

A.M COCKAR

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JUDGE OF APPEAL

R.S.C OMOLO

.....

Ag. JUDGE OF APPEAL

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

DEPUTY REGISTRAR