REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NYERI

CRIMINAL APPEAL NO 82 OF 1986

Karigu & Others.....appellant

v

Republic.....**respondent**

Judgment.

The three appellants were charged with and after a lengthy trial were each convicted of the offence of murder contrary to section 204 as read with section 203 of the Penal Code.The particulars of the offence alleged that on 14th August, 1983 at Ex-Lewa Town in Meru District of the Easter Province the three accused jointly murdered Sarah Wanjiru Muita.

There is no dispute that the deceased was the estranged wife of the first appellant, Kennedy, Kennedy Wachira Karigu, and sister-in-law of the second appellant, Stanley Muriuki Karigu. On the evidence there was no relationship between the third appellant, James Kinuthia Ndungu and the deceased or indeed with the other two appellants.

It is in evidence that as a consequence of the matrimonial differences between the deceased and the first appellant, on the complaint of the deceased, he was convicted of causing grievours harm to the deceased by the magistrate's court, Meru, and imprisoned.

On Sunday, August 14th, 1983, the deceased was brutally attacked by a gang of people at the material farm at about 1.00 pm as she, her driver and Stella Mugambi (PW 23) were traveling in the deceased's vehicle. She died of the injuries inflicted during that attack.

We proceed to consider the case of each appellant in this appeal, separately.

The case of the prosecution against the first appellant is founded wholly on circumstantial evidence related in part to the estrangement which we have already mentioned. We bear in mind the first holding in the case of Kipkering Arap Koske & Another, (1949) 16 EACA 135 to the effect,

> (1) That in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."

The correspondence between this appellant and the deceased were put in to establish a possible motive for the alleged involvement of this appellant in the offence. Whatever may have been the motive of the appellant in writing the letter to the deceased, in our judgment the letters do not disclose a motive which is relevant to this offence.

There is credible evidence that the first appellant had charge and control of the motorvehicle registration mark KJS 828 during the week ending with the date of the commission of the offence. Heavy reliance was put by the prosecution on the fact that this appellant took that vehicle to a local garage, had it repaired, assisted in the payment of the cost of repairs and generally drove the vehicle around until the

morning of the offence. We have considered this evidence and compared it with the testimony of the eye-witnesses to the attack on the deceased namely Dionisio Njeru (PW 19) and Stella Kanana Mugambi PW 23). It is our judgment having reviewed the evidence that there was no positive evidence that the vehicle that the vehicle registration mark KJS 828 was the vehicle used by the gang who ambushed and fatally injured the deceased.

It was also argued by the prosecution that only the first appellant could have caused the panga (Ex. 10) to be conveyed to the scene of the attack. We say simply that on the evidence that is not plausible. This appellant was not the only person who had access to the panga or pangas. We next deal with the two extra-judicial statements made by this appellant but subsequently repudiated and retracted. We agree that the statements were confessions within the meaning of section 25 of the Evidence Act. We also agree that the statements were properly admitted. Since, however, they were repudiated and retracted, in the light of the long line of authorities including Tuwamoi v Uganda 967 EA 84, it has been wrong citation held consistently that a trial court should accept with caution a confession which has been repudiated and retracted. Here, we are unable to hold that in all the circumstances the confessions are true.

As a result, the conviction of Kennedy Wachira Karigu cannot stand. His appeal is appeal is allowed, conviction quashed, sentence set aside and it is ordered that he shall be released forthwith forthwith unless otherwise lawfully held.

We turn to the appeal of Stanley Muriuki Karigu. The prosecution sought to establish that the second appellant was clearly identified by the two eye-witnesses PW 19 and PW 23 as the person who got out of the ambush vehicle armed with a panga, dragged the deceased out of her vehicle and assaulted her. The eye-witnesses purported to identify this appellant at the scene and at a subsequent identification parade. But having regard to the evidence of the police corporal Justice Njeru (PW 10), the officer to whom the two eye-witnesses reported soon after the attack, the two eye-witnesses did not identify the person who attacked the deceased. That being the case, the two extra-judicial statements of this appellant could not be true. There being no other evidence to connect this appellant with the offence, his appeal succeeds, the conviction is quashed, the sentence is set aside and he, too, is ordered to be set at liberty forwith unless he is otherwise lawfully held.

Lastly, we consider the appeal of James Kinuthia Ndungu. With regard to this appellant, there was defence medical evidence that he sustained injuries to his person while in police custody. He was arrested on 15th August, 1983. His statements were recorded on 24th August, 1983. His doctor examined him on 14th November, 1983. His injuries were found to be between 8 – 10 weeks old and so the injuries were inflicted during the period he was in police custody. The trial judge heard all that evidence but for unacceptable reasons rejected the appellant's case that the two statements were not voluntary. We say on the medical evidence, the appellant 's case that the two statements were not made voluntarily could be true. The statements were improperly admitted in evidence.

The only other piece of evidence left against this appellant is the claim that he lured the deceased to her death. Against this claim is the evidence of PW 10 that PW 19 and PW 23 told him that they did not identify any person in connection with the attack. This contradiction in the prosecution evidence is substantial and raises serious doubt as to the veracity of the two eye-witnesses. A reasonable doubt, the benefit of which enures to this appellant, is raised as to whether he was at the scene. So, his appeal succeeds, his conviction is quashed, sentence set aside and it is ordered that he shall be set free at once unless he is otherwise lawfully held.