IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NYARANGI, PLATT & GACHUHI JJA)

CRIMINAL APPEAL NO 170 OF 1984

BETWEEN

KARURA ..... APPELLANT

AND

REPUBLIC..... RESPONDENT

JUDGMENT

(Appeal from the High Court at Nairobi, Butler-Sloss J)

January 14, 1988, **Nyarangi, Platt & Gachuhi JJA** delivered the following Judgment.

The appellant was charged with three others for the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The three others were found not guilty and were discharged. The appellant was convicted and sentenced to death. He now appeals to this court against the conviction and sentence.

One of the grounds is that the judge erred in conducting the case without complying with section 262 of the Criminal Procedure Code. The attack was directed to the fact that much of what would be expected on the record was not there. The selection of the assessors and the recording of their presence in any session is not recorded. The counsel argued that if assessors did any wrong in the case it should be resolved in favour of the appellant. Nothing of such wrong was brought out in the course of the hearing of the appeal.

It is true that there are omissions in the record. However, the assessors could not have been absent or failed to participate in the full trial and yet be able to give their verdict at the conclusion of the hearing. They were selected and were present from the beginning. As the trial proceeded, there were references to the assessors as being recalled though there was no record of the time and at what stage of the proceeding they were requested to leave the court.

Whether or not the assessors were not recorded as having questioned the witnesses, it is not mandatory that they must do so. As it is not stated that they were forbidden to cross examine the witness this irregularity, if it be such, is curable, as the learned state counsel submitted under section 382 of the Criminal Procedure Code. We are of the view that the omissions in the record of the proceedings did not cause any miscarriage of justice or prejudice to the appellant; but a more careful record is required showing their full participation in the trial.

The main ground in this appeal is on the confession statement which was retracted and repudiated and the corroborative evidence to make it admissible in evidence. The statement was taken by Inspector Mugambi (PW 21) who was also the investigating officer. Counsel for the appellant submits that the Inspector being the investigator could have tailored the appellant's statement so as to suit the guilt of the appellant. This statement was retracted and repudiated by the appellant who stated that he was tortured by three police officers and forced to sign it. He gave a detailed account of what transpired. The statement was admitted after a trial within a trial.

We see the danger of the statement being recorded by the investigating officers. The practice has always been that the statement is recorded by another officer, who later would produce it in his evidence, but not the investigating officer in order to avoid this sort of allegation. The matter does not end there. Inspector Mugambi in his evidence stated that he collected clothes worn by all the accused and forwarded them to the government analyst. These clothes were labelled. There is no evidence showing where the appellant's clothes were and how they were collected.

No evidence as to how they were packed, how they were received from the government analyst and in whose possession they were until they were produced as exhibits. Inspector Mugambi's evidence that he collected clothes and took them to government analyst is not sufficient. They were not identified as such to the government analyst (PW 11) stated that he received the exhibits from PC David Mutuku Mutie and IP Henry Mugambi. PC David Mutuku Mutie did not give evidence. Which of these exhibits were delivered to the government analyst by Inspector Mugambi and which were delivered by PC Mutie?

The chain of evidence is vital. The evidence before the court is that the deceased's clothes were blood-stained and were taken together with the deceased's clothes to the government analyst for blood grouping. Without this chain of evidence, it is not possible to say whether or not the appellant's clothes were or were not at one stage in contact with the deceased's bloodstained clothes. There is no evidence that the appellant's shirt which had blood-stain drops was identified in court. It is not certain whether it is the one referred to by Inspector Mugambi. The shirt remains unidentified, and that destroys the basis of the judgment.

The trial judge convicted the appellant on the confession statement as corroborated by the government analyst's report. Following *Tuwamoi v Uganda* [1967] EA 84 the learned trial judge was aware of the standard of proof required and in particular that the confession statement must be corroborated in some material particular or by independent evidence acceptable to the court. In search for corroboration the learned judge in his judgment stated this:

'I find both corroboration, and independent evidence, in the evidence given by pw 11 Wilson Kibet arap Sogomo. He was the government chemist who gave evidence that the shirt which the first accused was wearing on the night of the 21 and 22 January had two blood-stains at the back. They were stains of human blood, and belonged to group A. The first accused's blood group is O. So that the stains on the first accused's shirt were not stains from his own bleeding. How then, one is entitled to ask does a person have someone else's blood-stains on the back of his shirt.

The government analyst had stated in his report that:

'The shirt of the first accused, Joseph Njaramba had two small group A human blood-stains on the back lower area.'

This is a fact presented to the government analyst as he found it but the identification was hearsay. The government analyst could not give conclusive opinion how blood-stains could have been at the back lower area. That was for the prosecution to prove. The blood-stain could have come from a person other than the deceased. He might have but did not state, how long the blood-stain had been on the shirt of the accused No 1 (the appellant).

The position of these two small blood-stains ought to have been carefully examined and analysed. The government analyst described the shirt as a blue long sleeved shirt. The blood-stains are at the back lower

area. This back lower area is not described properly. It is difficult to understand how blood-stains could have been at the back and not in front if the appellant hacked the deceased's head with a *panga*. There are no blood-stains in the front of the shirt, or the sleeves or shoes, or trousers. Is there a possibility of the appellant's supposed shirt coming into contact with other blood, or the deceased's blood-stained clothes so that two small bloodstains could have appeared on the back lower area of the appellant's shirt.

Couldn't that be a possibility? This might have been cleared if the chain of evidence had been given that the contaminated clothes were packed and handled with due care to avoid contamination. But in the court, the prosecution did not put forward any reason why the deceased's blood must be on the back of the appellant's shirt if indeed it was his shirt.

Blood stains are circumstantial evidence. In Alan Moritz, *Handbook of Legal Medicine* (3rd edn) at p 108 it is stated.

> "The typing of blood derived from material that is putrid, contaminated, dried or otherwise denatured is of difficult or impossible and should only be attempted by persons of great expertness and experience."

This does not underrate the competency of the government analyst who has ten years' experience. It only shows how difficult it is to come to the conclusion which conclusion might be negatived by other factors. The evidence to prove circumstantial evidence is enunciated in *R v Kipkering arap Koske* (1949) EACA 135 at 136;

> "In order to justify 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. 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 on the prosecution and always remains with the prosecution. It is a burden which never shifts to the party accused."

If the evidence on blood-stains cannot afford corroboration of the retracted confession statement, then the statement cannot be acted upon. The trial judge relied on the blood-stains to corroborate the retracted confession statement in order to convict and on no other evidence.

The trial judge did not consider the case for the defence. A detailed statement by the appellant was not considered. No reference is made of it in the judgment. The trial judge ought to have considered it. Failure to consider the defence is contrary to natural justice and unsettles the judgment *Okethi Okale v Republic* [1965] EA 555.

This is a first appeal. This court has to consider the evidence to make its own conclusion. The whole case relies on the blood-stains. The trial judge asked himself a question.

> "How then, one is entitled to ask, does a person have someone else's blood-stains on the back of his shirt?"

This court might also ask a question:

> "Why was there no blood-stain in the front or the sleeves of the appellant's shirt? Is there a possibility of the appellant's shirt being contaminated with the deceased's blood-stained clothes or that their origin was not the blood of the deceased?"

We think that the second posed question is a possibility in the absence of evidence to the contrary. If that may be so, does it afford corroboration that the appellant took part in the killing of the deceased? The link in the evidence leading to the blood-stain is missing and to rely on the bloodstain as corroborative evidence which evidence was not shown to have proved the guilt of the appellant would be unsafe. This is a capital offence and the accused should be sent to the gallows on cogent evidence not tainted with unconnected evidence. Two of the assessors who found the appellant guilty relied on the evidence of

blood-stains but one did not.

The learned state counsel also relied on the finding of the trial judge on blood-stain.

We have evaluated the evidence ourselves and due to our view of unconnected evidence of the exhibits and other irregularities we find it unsafe to allow the conviction to stand. We allow the appeal, set aside the conviction and sentence meted out by the High Court. We order the appellant to be released unless held for other lawful cause.

Dated and delivered at Nairobi this 14th day of January , 1988

J.O. NYARANGI

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JUDGE OF APPEAL

H.G. PLATT

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JUDGE OF APPEAL

J.M. GACHUHI

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JUDGE OF APPEAL