IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Hancox JA, Chesoni & Nyarangi Ag JJA)

CRIMINAL APPEAL NO. 132 OF 1983

BETWEEN

1. GEORGE KARANJA MWANGI

2. FRANCIS KARANJA KAMAU

3. MARCELLINUS MUCHOKI KAMAU.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

JUDGMENT

The three appellants George Karanja Mwangi (1st), Francis Karanja Kamau (2nd) and Marcellinus Muchoki Kamau (3rd) were convicted by the High Court sitting at Nyeri, (Patel J) of the murder, on the night of April 9 and 10, 1982, of a woman named Muthoni Thegeya at Kambirwa village in Muranga District of the Central Province. They were sentenced to death and have each appealed against conviction and sentence. Muthoni had three children: Paul Maina, Nyambura and Mwangi aged twenty five, eighteen and five years respectively, who all lived with her. The first appellant George, who lived with the Muthoni's, was the son of Muthoni's brother called Vincent Mwangi Thegeya. All the three children of Muthoni, the evidence on record revealed, were murdered that same night and buried with their mother in one mass grave in their potato garden. Their death was discovered on April 13, 1982.

On the morning of April 9 a neighbour, Wanjiku (PW 1), saw the deceased and her children alive at their house. Wanjiku did not see them on April 10 and on April 12 she became concerned and went to check at Muthoni's house, which she found locked. On noticing some bloodstains on external walls of that house Wanjiku called another neighbour, Mwangi Githinji (PW 2). Githinji reported to the Assistant Chief on the same day and Vincent Mwangi Thegeya made a report to AP Onesmus Kangethe (PW 13) who with another Administrative Police Officer and John Mwangi Wandia (PW 4) went to the house. They broke a window and checked but the Muthonis were not in their house. The Assistant Chief and his team then left the scene.

On that same day in the evening George Karanja went to the house of Wanjiku and asked her where Muthoni and her children were. Wanjiku asked him to tell her where they were since he lived with them. She then suggested that he should go to his father's home at St Mary to check for them but he declined to do so. This first appellant, the same evening suggested to Githinji that there were thieves around because he had seen the window of Muthoni's house broken. George went back to the house, but later when a police vehicle went to the house, he was seen by Githinji running away. William Kamau (PW 5) one of

the police officers, who visited the scene on April 12, 1982 said that he saw two persons running away from the scene. One lamp was in the house and another outside burning. A dead goat was hanging inside the house and chopped potatoes and rice were being cooked. There were bloodstains on the walls of two rooms, on bed sheets and floor and some soil had been sprinkled on the floor to cover the bloodstains. A fork *jembe* was observed in the compound that night of April 12. The police guarded the scene till the morning of April 13, when a search in the potato garden revealed a human body in the soil. The police went and obtained a court order from Murang'a court to exhume the body but when the grave was dug, not one, but four, bodies were found in it.

On April 13 at noon at Kagio Market the first appellant approached Patrick Wanjohi (PW 6) and offered to sell to Patrick a radio cassette for Kshs 400 and produced the permit and receipt for the radio cassette both of which were in the name of Paul Maina Thegeya which the first appellant claimed to be his name. However, as the appellant did not show Patrick his identity card Patrick did not buy the radio cassette. At that time the 1st appellant had a red briefcase. After failing to sell the radio cassette to Patrick the 1st appellant approached John Kuria Njeru (PW 7) at the same market and offered the same radio cassette for sale to Kuria who bought it at Kshs 400. The appellant told Kuria that the names, Paul Mama Thegeya, in the permit and receipt were his. Kuria gave the radio cassette, permit and receipt to the police from Murang'a Police Station at Kutus on May 3, 1982, and although he said that he went to Murang'a Police Station and pointed out to the police the first appellant as the person who sold him the radio cassette there was no evidence that the identification of the first appellant by Kuria was through an identification parade but the point was not taken in the lower court nor has it been raised in this appeal.

On April 14, the second and third appellants were arrested and Chief Inspector of Police Ferdinand Mburugu (PW 21) said statements were then recorded from them after which they were released pending investigations. They were required to report to the police every third day, which they did. Those earlier statements (as we shall call them) were not it would appear, produced in court as exhibits. On May 1, 1982 the first appellant was arrested from Paradise Hotel at Sagana by Inspector of Police Aggrey Atisali (PW 10) and Police Constable George Okello (PW 12). On May 2, the first appellant led Chief Inspector Mburugu and other police officers to the home of Marcellinus, the third appellant, and the latter was rearrested. A shovel produced in evidence as Ex 8 was then recovered from the third appellant's home. We shall have something to say about the shovel later. The first appellant had given the police directions to the home of Francis, the second appellant, and the same team of police officers rearrested Francis at 1 am on May 2/3.

On May 3, George volunteered to and did lead Chief Inspector Mburungu and other police officers to Kagio Market where he had sold, the radio cassette. Along the way on Sagana/Nairobi road the appellant directed the police to a home where a briefcase (Exhibit 6), which this appellant said contained his clothes was recovered. Still on the way the appellant took the police to the bush and showed them a *simi* and a bottle of poison which were recovered. After failing to trace the purchaser of the radio cassette at Kagio the appellant identified Kuria as the purchaser. Kuria admitted he bought it and took the police to his home from where the radio cassette was recovered together with the permit and receipt. The permit and receipt (Exhibit 7) were both in the name of Paul Maina Thegeya. The first appellant next led the police to the deceased's home, but as they found the house had been demolished and the remains burnt by Teresia Njoki, the first appellant's mother, nothing was recovered from it.

Inspector Osano (PW 13) recorded a statement under inquiry from the 1st appellant on May 2, 1982, and on May 4 Inspector John Bosco M'lnoti (PW 18) recorded a statement under inquiry from each of the second and third appellants. On May 6 Chief Inspector Nzuki recorded from each appellant a charge and caution statement. We shall deal with these statements later. On May 7, all three appellants were examined by Dr Michael Gakinya for age, mental fitness and physical injuries. George was aged twenty eight years and mentally fit. His missing ear lobe was an old loss. Francis was twenty years old and mentally stable. He had three small scars on his face, which were approximately one month old. Marcellinus was aged twenty four years and mentally stable. He had a fresh injury to his left ear which had a perforated eardrum. The perforation was less than one week old. This appellant also had a few small, healed old scars.

The appellants objected to the admissibility of their alleged respective statements under inquiry and under charge and caution. For each of the former the learned judge held a separate trial within a trial, but a joint trial within a trial was held for the charge and caution statements. The senior state counsel prosecuting suggested that course and the defence counsel told the court that he had no objection. Each appellant repudiated the statement under inquiry and the charge and caution statement attributed to him.

In their respective defences, severally each appellant made an unsworn statement and denied participation in the commission of the crime charged. The first appellant put up the defence of alibi. He said that he left the deceased's home on April 9, 1982 at 9.00 am to go to his mother's home at St. Mary's. He told the deceased's son, Paul Maina, that he would return to Kambirwa on May 20, 1982. He was arrested before he had returned to the deceased's home. He admitted being in possession of Paul Maina's radio cassette and receipt. He also admitted meeting Kuria at Kagio on April 13, 1982 but said that he gave Kuria the radio cassette to listen to for a week and a half and did not sell it. He gave the permit and receipt to Kuria so that he (Kuria) could not have any trouble. He said that at the request of the police he agreed to and did take them to where he had left the radio Julius Osano Mokoro (PW 15) recorded the inquiry statement from the 1st appellant on May 2, 1982. The appellant repudiated the statement. He said, during the trial within a trial that he was asked by Inspector Osano on May 3, 1982 to write where he was from April 9, to May 1 which he did in his own handwriting starting with his place of birth. He then wrote on white paper. On May 4 he was presented some papers to sign, but he refused because they were not those he had written on May 3. He was as a result of the refusal beaten and tortured so much that he had to give in and sign the papers. He asked to be told what was written in those papers but Inspector Osano would not tell him the contents. The appellant said that when he went for medical examination he told the doctor about the beatings and asked to be examined for the physical injuries to the penis and testicles but the doctor refused and examined him only for mental fitness and age. The doctor was not called to testify in the trial within a trial. This was unfortunate.

Mr Mahan, who appeared for all three appellants, stated that the first appellant first led the police to various places eg Kagio, Kutus and scene of the crime on May 3, 1982, before the inquiry statement was recorded first then visited the places spoken of. The writing on May 3, 1982 by the appellant was for the purpose of providing his handwriting specimen, so as to compare it with the letter (Ex 8) found by Inspector Osano in the first appellant mother’s house on April 14, 1982. The statement Ex 13 was not given voluntarily. The record shows that the statement the first appellant gave under inquiry was recorded on May 2, 1982 and Mr Mahan agreed to that, but said that it was not signed until May 4, 1982. The beatings and tortures are alleged to have started on May 4, when the appellant refused to sign the statement. The torture was therefore not inflicted at the time of recording the statement. There is no allegation of beatings and/or tortures during the recording of the statement until when it was brought up for signature two days later. It is, therefore, the signature which the first appellant says was not appended to the statement voluntarily. A further statement was given on May 3, 1982 but there was no controversy over that one. It would be a strange procedure for the police not to have asked the appellant to sign the statement when it had been recorded on May 2, 1982, and the appellant did not say that he was not asked to sign it on that day. He just said that a statement he did not make was brought for him to sign on May 4, 1982. As properly observed by Mr Mbai, if we accepted that the charge and caution statement of this appellant was properly taken (it was also objected to), there was no good reason for the appellant referring to his earlier statement by which he said he stood. While it may have been desirable to call Dr Gakinya in the trial within a trial, we do not think in the case of this appellant it would have served any purpose and that omission did not cause any prejudice to the appellant. The appellant's statement that he agreed to sign the papers because he thought they would finish him could not stand any test of truth.

In his charge and caution statement the appellant adopted his statement under inquiry. At his trial the 1st appellant denied that the signature on that document, Ex 16, was his and said that the document was never read out to him by Chief Inspector Nzuki. Here he did not allege any beatings or tortures but all the same repudiated it. No expert evidence was adduced to prove the signature was his but the trial judge was entitled, after hearing the parties to believe Chief Inspector Nzuki, as he did, that the appellant signed the statement in Nzuki's presence and it was the appellant's statement. The evidence shows that both the inquiry and charge and caution statements of the first appellant might have been voluntary.

The first appellant on his own admission and on evidence of prosecution witnesses, Consolato Gitau Kamau, Patrick Wanjohi and John Kuria Njeru, was in possession of a radio cassette, its permit and receipt belonging to Paul Maina Thegeya. There was evidence that Paul was murdered and buried in the same grave with his deceased mother Muthoni Thegeya. After his arrest the first appellant led police officers (Osano being one of them) to Kutus and identified the person to whom he had either sold (as alleged by Kuria) or given (as alleged by the appellant himself) the radio cassette, and it was recovered. He posed as Paul Maina to the purchaser of the radio cassette. This was happening between April 9 and April 13. On April 12, he went back to the scene, gave false stories of where the deceased had gone and also said Paul Maina had gone to Nairobi. All this was circumstantial evidence against the first appellant. An offence like murder can be established by evidence tendered directly proving it or by evidence of facts from which a reasonable person can draw the inference that murder had been committed. It is well established that in a case depending exclusively upon circumstantial evidence the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt; *Peter Kubuita Paul v Republic* Cr Appeal No 71 of 1979 (unreported). In *Simoni Musoke v R* (1958) EA 715 the predecessor of this court said:

"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

to have known that the statement was not in his handwriting. He denied making any statement to Inspector Bosco. The difficulty in accepting the appellant's explanation of signing the statement under the mistaken belief that it was the one he wrote himself on April 15, 1982 lies in the fact that Exhibit 14 is on some 23 handwritten pages on all of which he has admitted appending his signature. It is inconceivable and against any logic that he would sign all these 23 pages without seeing that the handwriting on them differed from his. If his story is true, he was not being beaten because he had refused to make the statement, but so that he would sign it. He was beaten before he had even asked and refused to sign! His explanation was more of an afterthought than a fact in a vain attempt to repudiate his own inquiry statement in respect of which there was no evidence that its making was involuntary.

Inspector Bosco said that the second appellant spoke in both Kiswahili and English languages, but the statement was recorded directly in English. The correct procedure is to record the statement in the language(s) used by the accused and then translate it into English. Both versions must be produced in evidence. The defence did not complain of the method adopted by Inspector Bosco and no injustice was occasioned, the defence counsel being aware of the matter.

We must also now point out that where an accused person makes more than one statement to the police all his statements should be produced. Again the defence counsel was aware of the allegation that the appellant made an extra-judicial statement on April 15, 1982 and did not complain of its non-production nor has there been such complaint on appeal. There is no evidence of any injustice arising from non-production of the earlier statement.

In his charge and caution statement recorded by Inspector Nzuki this appellant is alleged to have said:

"I have nothing to say, apart from I agree that I killed (murdered) those people."

The words “apart from” do not appear to be in the Kiswahili version. This statement was repudiated by the appellant who said that he had never seen it before and it was not signed by him. There was no handwriting expert's evidence, but that does not mean that the trial judge could not rule on admissibility of the statement on the evidence before him. The allegation of beating was irrelevant to the cautionary statement, since what the appellant said was that he neither made nor signed the statement. That was a matter of fact depending on who the trial judge believed. He believed Inspector Nzuki's evidence that Francis made and signed the statement. Mr Mahan has not convinced us that the judge was wrong in so finding. That statement does not refer to the inquiry statement and it is a full confession of the appellant's participation in the crime charged. The judge believed and warned himself of the danger of convicting on an uncorroborated repudiated confession. The appellant might, in our opinion, have been convicted on the

strength of either the inquiry statement or on the charge and caution statement or both.

The appellant was implicated in the statement of the first appellant and as regards that evidence the position is as what we have said in the appeal of the first appellant. It was evidence, though of the weakest kind, to be taken into consideration against the second appellant, but since a retracted confession by an accused can be taken into consideration against a coaccused (*Anyuma s/o Omolo v R* (1953) 20 EACA 218) the first appellant's statement and his being implicated in the inquiry statements of the first and second appellants.

The inquiry statement was recorded by Inspector Bosco. The appellant said that from the time of his arrest on May 1 he was thoroughly beaten and his penis tied with testicles with a rubber band. On May 5 he was still being beaten and was given a statement to sign and when he refused he was beaten further and Chief Inspector Mburungu slapped him hard on his left ear and he fell down. When Dr Gakinya examined the appellant on May 7 he found him having a fresh perforated left eardrum. The injury was less than a week old. This evidence was not given at the trial within a trial, but the learned judge had heard it in the main trial. Had it been given in the trial within a trial and properly considered it might have raised a reason to suspect that the confession had been improperly induced. As was said in *R v Mitlande* (1940) 7 EACA 46 the onus is on the prosecution to prove that the confession was voluntary. Despite the judge's speculation as to the cause of the injury to the appellant's left ear, that was a matter which could have lent credence to the allegation that the appellant was beaten, and in the circumstances, might have led to a finding that the prosecution had not discharged the onus on it: *Edong s/o Etat v R* (1954) 21 EACA 338. Once the appellant's two statements are excluded there might be no evidence on which the appellant might be convicted.

The learned judge treated the evidence of the finding of a shovel in the third appellant's house on his second arrests corroborative of this appellant's story.

This admission of the evidence regarding the shovel, Exhibit 8, has caused us much anxiety. The basis for its admission, so far as we can discover, is the reference by the third appellant in his disputed inquiry statement, Exhibit 49, that he used a spade, which he had brought with him from home for the purpose of digging the grave in which to bury Muthoni, her sons Paul and Mwangi, and her daughter Nyambura, after they had been killed. The crime took place on the night of April 9 and April 10, 1982, and that is the time to which the third appellant was referring in that portion of his statement.

The shovel, however, even assuming that it is the same implement to which this appellant was referring, was not found to be missing from the house of Francis Kamau Kamwaro (PW 8) who is the third appellant's father, until May 4, 1982, according to that witness's evidence. He and his appellant had intended to use it on May 2 for the purpose of unearthing some charcoal, but the appellant did not turn up on that day. Accordingly Kamwaro himself went to get the shovel on May 4 and found it was missing. In apparent conflict with that which he had just said, Kamwaro then testified that he had been present when the third appellant took the shovel from his bedroom on May 2 and, further, that accused I (not the third appellant) put the soil on the place from which some smoke was coming.

Despite these inconsistencies, it is manifest that the effect of Kamwaro's evidence is that his shovel was not missing from his house until, at the earliest, May 2. How then, could it have been relevant to the issue of the instrument used to dig the mass grave on April 9? We are surprised that defence counsel at the trial, who must have been alive to this aspect of the case, made no objection to the admissibility of this evidence.

In dealing with this issue, the learned judge first rejected the suggestion, advanced by state counsel prosecuting the case, that the shovel had disappeared on April 4, since Kamwaro had said he only missed it on the May 4. Not only had state counsel said that but he is on record as submitting that the shovel was:

"The same one that was used in digging and covering up the grave."

For the reasons we have demonstrated, this could not have been so, and the judge at first accepted that

position. Yet almost immediately afterwards he treated the existence of the shovel (which was recovered by IP Mukoro from the third appellant's house at the time of his arrest on May 2), as one of the items of evidence corroborating the story (meaning the inquiry statement) of this appellant. This was a clear misdirection, and since the other items of evidence he treated as corroboration under headings (b), (c) and (d) towards the end of his judgment do not in any sense amount to corroboration, it means that there was in fact no valid corroboration of the third appellant's two statements to the police both of which were challenged, and both of which therefore either needed corroboration or a warning followed by a direction of finding that it was safe to act upon them without corroboration. The position might have been different if, for instance, the shovel had been sent for analysis and on it were found traces of earth or other substances connecting it with the area where the killings took place. Then some foundation would have been laid for the reception of the evidence regarding the shovel. Here there was no such foundation.

The evidence regarding the shovel was therefore prejudicial to the case of the third appellant without it having any corresponding, or indeed, any probative value, since not only as it not shown to have been the implement used to dig the grave, but the indications are that it was not the one so used. When all is said and considered, the third appellant's conviction may not hold.

Another matter that has caused us great concern is the subject matter raised in grounds 6, 5 and 4 of the petitions of appeal of the first, second and the third appellants respectively. The point raised in these grounds is that the learned trial judge misinterpreted the provisions of section 322 of the Criminal Procedure Code relating to the duties of assessors. At the conclusion of the summing up the trial judge asked each assessor to give individual opinions. However, when the assessors returned after considering the case, that was not what happened, for the High Court record shows that when the second assessor told the court that assessor number 3 would give their verdict, the judge accepted that position and proceeded to record that which assessor number 3 said on behalf of all three, which was then agreed to by the other two assessors.

Mr Mahan's contention was that the irregular procedure adopted by the court implies that the first and second assessors did not give their individual opinions as required by the law, thus denying the court the benefit of their opinions. Mr Mahan contended that each assessor was required to give his individual opinion on each accused. He referred this court to the judgment in *Bitton Gichine Mugo v Republic* Criminal Appeal No 13 of 1983 (unreported) by the former Court of Appeal for Eastern Africa. Although Mr Mbai agreed that it was desirable for each assessor to give his own opinion, the other two confirmed that of the 3rd assessor which distinguished this case from what happened in Mugo's case, where one assessor spoke for the other two assessors, who were not asked to confirm his opinion. This irregularity did not occasion a failure of justice and was therefore curable by section 382 of the Criminal Procedure Code.

Section 322(1) of the Criminal Procedure Code provides as follows:

"When, in a case tried with assessors, the case on both sides is closed, the judge may sum up the evidence for the prosecution and the defence, and shall then require each of the assessors to state his opinion orally, and shall record that opinion. (underlining is ours).

It is clear from the language of the section that the law requires each assessor to state his own opinion personally and the trial judge to record it. As the learned judge had correctly directed the assessors of the requirement to give individual opinions, he should have insisted on this when the other two told him that they had selected the third assessor to speak on their behalf and, if necessary, should have allowed them to retire again to enable them to form individual verdict. The High Court ought, in a trial with the aid of assessors, not to accept a representative opinion by one of the assessors, even if such an opinion is agreed to by the other two assessors by way of mere confirmation. We agree with Mr Mbai that in the instant case the other two assessors individually expressed their support of the third assessor’s stated opinion. This differs from the situation in *Francis Juma s/o Musungu* (1958) EA 192 where only one assessor spoke to the court. In our view as there was no miscarriage of justice occasioned the irregularity is curable by section 382 of the Criminal Procedure Code.

This brings us to a more serious error. During Inspector Osano's evidence, defence counsel, Mr Ghadialy, told the court that points of law are likely to arise. At that juncture the trial judge ordered the assessors to leave the court, which they did. The High Court record shows that the witness continued to testify to matters of fact in the absence of the assessors before the trial within a trial, when Mr Ghadialy objected to the admissibility of the statement.

The part of the trial relating to PW 15's evidence dealing with a most important aspect of the case against the first appellant, namely the tracking down of the radio cassette said to belong to one of the deceased, whose body was found with that of Muthoni in the mass grave, was without the aid of the assessors and therefore contravened section 262 of the Criminal Procedure Code.

This section requires all trials before the High Court to be with the aid of the assessors. This means that they must be present throughout save only when the admissibility of evidence intended to be adduced is challenged or a point of law otherwise arises.

This mandatory requirement makes assessors part of the court and, as was stated in the case of *Ndagizimana and Another v Uganda* (1967) EA 35 at p 38, it is essential that all the evidence and proceedings at the trial should be in their presence except when a dispute arises as to the admissibility of evidence. It is necessary that all the evidence on which the prosecution case is based should be in the assessors' presence. The prosecution cannot rely on the evidence given in the "trial within a trial" in the absence of the assessors to establish any of the essential facts of their case. We agree with the learned judges in *Ndagizimana* (*ibid*), although that was decided on Uganda law as it then was, but the position is the same with our law on the point and say, as they did that:

"Under our law the judge is the ultimate judge of the facts but before he delivers his judgment he must first require each assessor to state his opinion of the case. He is not bound to accept their opinion and record it and his judgment may, quite properly, be considerably influenced by these opinions. It is therefore absolutely essential for the assessors to hear all the evidence which the judge has ruled as being legally admissible."

In our opinion, the part of trial which was held in the absence of the assessors constituted a fatal irregularity in the conduct of the trial which offended section 262 of the Criminal Procedure Code. In our view the appellants did not have a satisfactory trial. In the case of *R v Vashanjee Liladhar* (1946) 13 EACA 150 the Court of Appeal for Eastern Africa said, and we agree with this statement, that:

"An order for a retrial is the proper order to be made when the accused has not had a satisfactory trial."

We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible, evidence a conviction might result: *Braganza v R* (1957) EA 152 (CA) 469 *Pyarala Bassan v Republic* [1960] EA 854. In our view, there was evidence on record which might support the conviction of the appellants.

In the result we allow the appeal of all three appellants, quash their convictions, set aside the death sentences passed against each of them, and direct that the appellants be retried by a competent court. They shall be remanded in custody pending their retrial. Those are the orders of the court.

Dated and Delivered at Nairobi this 13th day of July 1983.

A.R.W.HANCOX

.....

JUDGE OF APPEAL

Z.R.CHESONI

.....

AG.JUDGE OF APPEAL

J.O.NYARANGI

.....

AG.JUDGE OF APPEAL

I certify that this is a true copy of

the original.

DEPUTY REGISTRAR