



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL CASE NO 71 OF 1978

REPUBLICAPPELLANT

VERSUS

THOMAS OKINYI KIBIBA.....RESPONDENT

JUDGMENT

The accused, Thomas Okinyi, is charged with murdering his sixteen-year old son, James Okinyi, on 18th March 1978.

The Okinyi family consisted of the father, Thomas, the mother, Mereni Bosibori, two sons, James (the deceased) and Henry (about ten or eleven years) and three daughters, Unifirita Moraa (about nine or ten years) and two younger daughters. James, the deceased, had apparently left home at Bonyagotanya village some three weeks before the incident and had gone to stay somewhere in Kisii township and there is evidence to suggest that his father, the accused, was annoyed at this.

The prosecution case is that on the morning of 18th March 1978 the mother, Mereni, left home for a nearby market to sell fruit. She was accompanied by a neighbour, one Pacifica Moraa. The accused went to Kisii township to look for James and found him. He brought him back home. Henry had gone to the river, but Unifirita and the two younger girls were at home. Unifirita then describes what happened as follows:

Thomas, my father, asked me for a rope. I gave him a piece of rope. He tied James on his hands. He then asked me for a *panga*. He cut some sticks with the *panga*: he cut four sticks. He cut sticks from the *shamba*. They were as thick and long as the arm of the chair in Court. He tied James against a tree and started beating him with the sticks. James was hanging from the tree. He beat him until all sticks were broken. Then he kicked him with his leg on the stomach; he had shoes on. Thomas then went to pick fruits. He took the fruits to a school. James was still hanging from the tree. When father came back from the school, he untied James. He left him on the ground and said he was going to collect my mother. He came back with my mother and Pacifica. My mother cried. My father took a *panga* and started chasing my mother. Mother ran away ... When mother left, father took sticks and burnt them.

The boy Henry said he left home to wash clothes at the river in the morning. His brother James was not there. When he returned at 3.00 pm he found his brother lying dead under a tree. He confirmed what Unifirita said that his father burnt sticks which were lying near his brother's body.

The wife, Mereni, and Pacifica gave evidence that whilst at the market in the afternoon, the accused came to them and said "I went to Kisii to look for James, brought him back and killed him". They went back home with him and found James dead by the tree. Mereni started crying and the accused chased her away

with a *panga*.

Mr Nyakongo for the accused objected to the admissibility of what the accused told Mereni and Pacifica, on the ground that it is hearsay. I ruled, however, that what the accused said was an oral confession which is admissible as one of the recognised exceptions to the hearsay rule. Mereni was, of course, a competent and compellable witness under section 127(3) (c) of the Evidence Act. No objection was taken on the basis that the confession was in any way involuntary or induced. However, as appears presently, the accused said that he never told Mereni and Pacifica what they allege he told them.

Dr RD Singh, who carried out the post-mortem examination on 20th March 1978, found that the deceased had multiple contusions on the legs, thighs, arms and back and both wrists. There was extensive haemotoma under all contusions and he was of the opinion that the cause of death was shock and bleeding consistent with infliction by a blunt weapon such as a stick.

In the morning of 19th March 1978, the accused went to the home of his Assistant Chief and reported that his son had died. He did not say how. At noon, he went to the Kisii police station and also reported. He was arrested. On the following day, he made a cautionary statement to an inspector of police in which he said "This boy is my son and I did not murder him".

At the preliminary inquiry, the accused made an unsworn statement as follows:

On 18th March 1978 at about 9.00 am I was on my way home from my place of work. I arrived home at about 10.00 am on the same day. I found all five of my children, ie two sons and three daughters present. My wife was away from home when I got there. On arrival, I took a *panga* and went to clear weeds in my sugarcane plantation close to my home. When I got to my sugar cane plantation, I noticed that there were plenty of guava fruits. I decided to go back to my house and bring a *karai* for putting guava fruits. I then went back to my house. I collected a *karai* and returned to my sugar cane plantation. I picked some guava fruits and took them in my *karai* and returned to my house. I then took my guava fruits to Kioge Girls Secondary School for sale. I sold all the guava fruits I had with me. I then returned back to my house. I returned there at about 2.00 pm on the same day. On return I found my daughter, namely Unifirita Moraa, at home. She was there with her two young sisters. The rest of the children were not present. I asked my daughter Moraa where Henry, one of my sons was. She replied that Henry had gone out for a walk. I also asked her where James Okondo (the deceased) was. She replied that he was sleeping under a tree nearby. I went there. I found the deceased lying on his side. I examined him, and found that he was dead.

I then went to Nyakoe market I found my wife there. I told her that the deceased James Okinyi was dead. I also told her that I did not know what had killed him. That is all I wish to say.

The accused substantially repeated this in an unsworn statement at the trial.

The first issue in this case is the credibility of the only eye-witness, the child Unifirita. Although she said she was twelve years old, she appeared no more than nine or ten years. I conducted the usual examination required under section 19(1) of the Oaths and Statutory Declarations Act and ruled that her evidence should be received, but not on oath. I am of the view that she basically told the truth as to what she saw. She said substantially the same thing at the preliminary inquiry and she was not shaken in cross-examination. The assessors also take the view that she was a truthful witness.

The fact remains, however, that her evidence requires corroboration as a matter of law under section 124 of the Evidence Act, ie:

the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

This leads me to a consideration of the second issue in the case, ie whether the accused made the oral

confession to Mereni and Pacifica, or whether he only said, as he claims, that James was dead and that he did not know what killed him.

I have no doubt that Mereni and Pacifica are truthful witnesses and that they substantially repeated in evidence what the accused had told them, ie that he had killed, James I reject what he says in his unsworn statements.

The assessors agree with me on this issue.

That, however, does not dispose of the matter, because the oral confession has been repudiated by the accused and this normally requires corroboration. The matter was put thus in *Tuwamoi v Uganda* [1967] EA 84, 91:

A trial Court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true.

The same standard of proof is required in all cases and usually a Court will only act on the confession if corroborated in some material particular by independent evidence accepted by the Court. But corroboration is not necessary in law and the Court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true.

If the oral confession in this case itself required corroboration then it cannot provide corroboration for Unifirita's evidence, which also requires corroboration. Mr Chunga for the Republic argues, however, that a statement by an accused person provides an exception to this rule and he cites in support *Pyaralal Melaram Bassan and Wathobia s/o Kiambu v R* [1961] EA 521, 530, where the Court said:

As regards the learned judge's reference to the statements of each appellant providing corroboration as against the appellant of the accomplice evidence given by Tanganyika, it is true that those statements were retracted, but we see no reason why they should not be taken in account as corroboration of Tanganyika's evidence. It is, of course, a well-established rule of prudence that it is unsafe to act upon a retracted confession in the absence of corroboration of the confession in a material particular. It is to be noted that in the instant case none of the first appellant's statements amounts to a confession, while only four of the second appellant's statements were held to amount to confessions. It is true that as a general rule evidence which itself requires corroboration cannot provide corroboration for other evidence also requiring corroboration, but retracted statements are not of the same quality as accomplice evidence. We think that a statement made by an accused person, whether amounting to a confession or not, may in a proper case amount to corroboration of accomplice evidence. In *Credland v Knowler* (1951) 35 Cr App Rep 48, it was held that not only were certain admissions made by the appellant to a police officer, not in themselves inculpatory, strong corroboration of certain prosecution evidence, but that a lie told by the appellant to the police officer was also capable of being corroborated. In the latter connection the Lord Chief Justice said: "... one has to look at the whole circumstances of the case. What may afford corroboration in one case may not in another. It depends on the nature of the rest of the evidence and the nature of the lie that was told".

In *Sarkar on Evidence* (9th Edn) at page 1089 it is said: "Retracted confession of an accused may be sufficient corroboration of the approver's story as against himself".

As will be seen, the Court was here dealing with the corroboration of accomplice evidence, and not children's evidence, as in this case. However, I find no distinction in principle, and I would have been prepared to hold, were it necessary, that the same rule obtains for the corroboration of a child's evidence by a repudiated or retracted confession.

I say that it is not necessary for this reason. In *Tuwamoi*, the Court makes it clear that a Court may act on

a repudiated confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true. I can unhesitatingly say that I am so fully satisfied in this case. Upon his own admission, the accused was the only adult present at the home and its vicinity that morning. There is no doubt from the medical evidence that the deceased was beaten to death. If the confession were not true, one may legitimately ask, who on earth beat this boy to death? It is clear that the accused beat him and he told his wife so. He did not report to the authorities until the following day, and then maintained his unlikely story that his son was killed; but he did not know how. As two of the assessors rightly remarked in giving their opinions “the accused is stupid in trying to hide the fact that he beat his son”.

This leaves the question of whether the accused is guilty of murder or manslaughter. I disregard the submission of the accused’s advocate that even if his client beat his son, he is guilty of nothing because beating one’s son is a lawful act. With respect, this submission has no merit whatsoever in the circumstances of this case.

Did the accused have the necessary malice aforethought to constitute murder? Mr Chunga argues that he had, if not within section 206(a) of the Penal Code, then within section 206 (b) ie:

knowledge that the act ... causing death will probably cause death or grievous harm ... although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

Mr Chunga argues that the test is objective, that is to say, one must look to the reasonable man in the accused’s community and ask whether such a man would know that if he beat his child in the way that the accused did in this case, he would know, or ought to know, that such act would probably cause death or grievous harm.

One assessor took the view that the accused was guilty of murder. The other two opined that the accused only intended to discipline his child and that he is guilty of manslaughter only. I agree with the majority view of the assessors. Certainly, I do not think that this accused, looking at the matter subjectively, either intended to kill his son or cause him grievous harm. Equally, I am of the view that neither this accused, nor a reasonable man in his community, would necessarily have known, that the act of beating would probably cause death or grievous harm. In this connection, I note that the accused used sticks and not sharp weapons, that the sticks broke in the process of beating, so that they could not have been very thick or hard, and that the injuries on the deceased’s body all consisted of contused wounds, ie bruises. There were no cut-wounds or fractures and breakings in the internal organs.

For these reasons, I hold that the accused beat his child unlawfully and caused his death, but without malice aforethought. He is guilty of manslaughter only, and I convict him accordingly under section 205 as read with section 202 of the Penal Code.

Conviction for manslaughter.

Dated and delivered at Kisumu this 23rd day of April 1979.

E.COTRAN

JUDGE.