



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: MADAN, LAW & POTTER JJ A)
CRIMINAL APPEAL NO 60 OF 1979
BETWEEN
KAMBI & 3 OTHERS..... APPELLANT
AND
REPUBLIC.....RESPONDENT
JUDGMENT

(Appeal from a conviction and sentence of the High Court at Mombasa (Simpson J) in Criminal Case No 27 of 1979 dated 4th September 1979)

May 8, 1980, the following Judgment of the Court was delivered.

The four appellants were jointly charged with the murder of one Mohamed Takuyu. They were duly convicted in the High Court (Simpson J) and they now appeal to this Court against their convictions.

The case for the prosecution was that the appellants and the deceased were charcoal burners operating from a camp in a forest at Bidilimole in Kwale District of the Coast Province. The appellants decided to kill the deceased and another man said to be Somalis and to steal their money.

They invited two other charcoal burners Kalume Charo (PW 2) and Karisa Mwavilo (PW11) to join them but they refused. On a later day probably the 30th October, 1978, the 4 accused told Kalume and Karisa that they had killed the Somalis. They led Kalume and Karisa to a place in the forest where the Somalis' clothes and other property were lying. The 4th appellant destroyed these items by pouring paraffin on them and setting it on fire. Then the appellants took Kalume and Karisa to a pool in the forest where the 4th appellant administered an oath to them to the effect that if they revealed anything about the killing of the Somalis they would die.

Then they returned to the camp where the money stolen from the Somalis was shared out amongst the 6 men as follows – Kalume received shs 700/- - Karisa shs 800/- and the 4 appellants shs 1000/- or shs 1050/- each.

About one month later, on 25th November 1978 the 4th appellant told villagers about the murder of the Somalis. One of these villagers was Jangaa Wanyika (P.W.3) who also happened to be an *askari* under the local sub-chief. Jangaa arrested the 4th appellant who then showed him a place in the forest where

there were some human bones lying around. The sub-chief informed the police at Lunga-Lunga who arrived on the scene, re-arrested the 4th appellant and took possession of the human remains. As a result of what the 4th appellant told them the police arrested the other three appellants and Kalume (PW 2). The latter however was soon released. The appellants were in due course moved to Diani Police Station where on 13th December, 1978, they were separately charged with murder by Inspector Mathenge and cautioned. All 4 appellants then made statements in the nature of confessions. The 1st and 2nd appellants said that Karisa (PW 11) had instigated the killings, the 3rd appellant said that although Kalume (P.W. 2) was given money he was not involved in the killings and the 4th appellant said that neither P.W 2 nor P.W 11 was involved in the actual murders but were given money to ensure their silence. These statements were admitted in evidence at the trial, after trials within a trial, all 4 appellants claiming that the statements had been induced by ill-treatment. The learned trial judge did not believe them and was satisfied that all four appellants had made their statements freely and voluntarily. At the trial the four appellants made unsworn statements in their defence denying all knowledge of the crime.

In convicting the appellants the learned trial judge held that Kalume was not an accomplice but that Karisa should be treated as one having been implicated as instigator in the statements made by 1st and 2nd appellants. He held that Kalume's evidence amply corroborated that of Karisa and the retracted confessions of all 4 appellants. He also held that if Kalume was an accomplice, the retracted statements of the 4 appellants corroborated the evidence of Kalume and Karisa implicating them. The learned judge convicted all 4 appellants.

The principal grounds of appeal argued by Mr Wa Hare for the appellants are common to the memorandum of each appellant and are –

- (1) that their statements were not made voluntarily and should not have been admitted in evidence, and
- (2) that Kalume and Karisa should have been held to be accomplices.

As regards the statements, they were taken by Inspector Mathenge who had nothing to do with the investigation and who testified that none of the appellants appeared to have been ill-treated or complained to him of ill⁴⁹⁸ treatment. The trial judge was satisfied after full enquiry that the statements were made voluntarily and we see no reason to differ from him in this respect. As regards the other main ground, the learned judge did hold that Karisa should be treated as an accomplice, but that Kalume was not an accomplice although he had accepted money; he did so because of fear of the oath he had been forced to take and fear of the appellants. The judge did not in this connection mention the fact that after the murders had been committed Kalume hid a blood-stained *panga* which had been used to kill the Somalis, and that although he had fore-knowledge of the intended crime and knowledge of the crime after it had been committed he took no steps to prevent its commission or to give information to the authorities that it had been committed. Kalume was, in our view, clearly an accessory after the fact. The mere fact of being an accessory after the fact does not necessarily make a person an accomplice, see *R v Nanta s/o Ndimi* (XI EACA 83) and *R v Kinyangabwaru Matasa* (IX EACA 90), absence of knowledge that a crime had been committed until after the event may indicate that the accessory is not necessarily an accomplice, but in this case Kalume had fore-knowledge and accepted part of the proceeds of the crime. We agree with Mr Wa Hare that he should have been treated as an accomplice, as was Karisa.

But even on the basis that both Kalume and Karisa were accomplices we agree with the learned trial judge on the authority of *Bassan and Wathioba v Republic* [1961] E.A. 521 that in the case of each appellant his retracted confession provides sufficient corroboration of the evidence of Kalume and Karisa that the appellants invited them to participate in the killing of the Somalis, that they later told them of the commission of the murders; and that the proceeds of the crime were produced and shared out.

Mr Wa Hare also submitted that proof beyond reasonable doubt that Mohamed Takuyu was dead was not produced. All that was produced was a few human bones which could not be identified as being the remains of any particular person. This submission would be valid if each appellant had not confessed to the murder of Mohamed Takuyu or if the confessions had been excluded from evidence. As it is the

confessions are in evidence properly as we have held and no reasonable doubt exists that Mohamed Takuyu is dead as alleged in the charge.

In our view the evidence adduced in this case leaves no reasonable doubt that the appellants were properly and rightly convicted. We consider that the appeal of each appellant fails and we order that all four appeals be dismissed.

Dated and delivered at Mombasa this 8th day of May, 1980

C.B MADAN

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JUDGE OF APPEAL

E.J.E.LAW

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JUDGE OF APPEAL

K.DPOTTER

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR