IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Miller & Potter JJA

CRIMINAL APPEAL NO. 70 OF 1979

Between

WILSON KINYUA .....APPELLANT

IBRAHIM M'INANGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the High Court at Meru, Cockar J)

JUDGMENT OF THE COURT

November 10, 1980, **Madan, Miller, & Potter JJA** delivered the following Judgment.

These two appeals which we have been consolidated, are against convictions for murder contrary to section 204 of the Penal Code. The deceased, Antonio M'Ibaya, during his lifetime was the registered owner of a parcel of land known as No. Nyaki/Munithu/1128. The first appellant, Wilson, claimed it was a portion of land which the deceased had agreed to sell to him. Wilson had filed a suit against the deceased during his lifetime in the court of Resident Magistrate, Meru for specific performance of the agreement of sale of the land. The suit was fixed for hearing on June 12, 1976.

Towards the end of March 1978, Wilson and the second appellant, Ibrahim, spent a night at Mutuati where the deceased was living with his second wife, Veronica. In the early hours of the next morning, the two appellants asked for directions and were shown the way to the deceased's house where Wilson asked the deceased to accompany them to Meru so that they could settle the case between them in court. The deceased went with them. The three got onto a bus going towards Lare. From Lare the deceased was seen going towards Kangeta with some others in a Land Rover by Maria Mwaringu (PW 5). The learned judge erroneously said in his judgment that Maria confirmed the presence of the deceased and his visitors at Lare. Maria did not claim to have seen or known the deceased's visitors.

Some ten days later, the burnt remains of a human body with some items of clothing were found in a nearby Kangare Forest. The surrounding area had been set on fire. There was a human skull among the dead bones. The learned judge found that the items of clothing and the human remains were those of the deceased.

Wilson was arrested on June 12, 1978, in the court building at Meru. Ibrahim was arrested on July 9, 1978, at Kibirichia. They were both charged with the murder of the deceased, tried and convicted. Before

their arraignment in court, both appellants made charge and caution statements to the police. The second appellant, Ibrahim's, statement was admitted in evidence after a trial within a trial. Wilson said in his statement that he did not and could not have killed the deceased who was his friend since 1961 and whom he had never seen since February 20, 1978.

Ibrahim told the police that he met Wilson in his butchery at Isiolo. After a discussion and an offer of payment of Shs 200 by Wilson, he agreed to help Wilson to kill the deceased at Mutuati because the deceased had refused to give Wilson the *shamba*. After spending a night at Mutuati they went to the deceased's house next morning. Wilson asked the deceased to accompany him because he wanted them to change the hearing date of the case. The deceased agreed. The three of them left together on board a bus going towards Lare where they alighted and got into another vehicle. They finally reached Ngunduni in the evening of the same day. Wilson, who had a basket, went into a canteen and came out with a rope. They began to walk. Wilson took out a *panga* from the basket, cut the rope into two and tied the deceased's hands behind his back. They walked on and entered a thick forest at Kangere. Wilson gave the basket to Ibrahim to hold it, pulled the deceased into the forest and knocked him down. Ibrahim said he put down the basket and held the deceased's legs.

Wilson cut the deceased's neck with the *panga* while Ibrahim held the legs. Ibrahim then took a stone and hit the deceased on the head. Wilson threw the stone into a river nearby. He told Ibrahim to go home which Ibrahim did leaving Wilson there with the *panga*, the basket and a torch.

The following morning, Wilson gave him the *panga* to keep it until his return from Nairobi. Ibrahim said he had the *panga* in his house as Wilson told him to do. In his unsworn statement in court, Wilson said that he did not know anything about this case. He was arrested in the law courts where he had come for his work. He was told after ten days that he had killed someone. He was very surprised because he had not killed anyone. He was not shown the dead person or the place where he died.

In his unsworn statement in court, Ibrahim said he stayed at home the whole of his last year. He did not go on any *safari*. He was arrested by Mbabu, PW 15, because of a grudge. Both the person who died and Wilson came from Muruthu. He came from Tigania. He knew nothing about this case. That was all.

The learned judge in his judgment said:

> "The prosecution case is that the two accused on the way murdered the deceased, put his body in a bush and set fire to the deceased's body ... The charge and caution statement of the 2nd accused was a confession which he repudiated. The facts proved by the prosecution evidence overwhelmingly and conclusively point to the accused being guilty. The proved facts leave the deceased's death incapable of any other reasonable explanation ... The 2nd accused described the charge and caution statement the part he took in the actual murder. It is a confession which can be taken into consideration against the 1st accused also."

With respect to the learned judge, there were no facts proved by the prosecution evidence which overwhelmingly and conclusively pointed to the two appellants being guilty of the murder of the deceased.

All that the prosecution evidence proved was that the two appellants and the deceased were last seen together at Lare. Then there was a lacuna created by the absence of any actual or acceptable circumstantial evidence of who may have killed the deceased. There was a hiatus, a total blackout, between the deceased being seen with the appellants at Lare and the discovery of the deceased's burnt body in Kangere Forest. Then came Ibrahim's confession which he repudiated.

Section 32(1) of the Evidence Act provides:

> "32(1). When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons

is proved, the court may take the confession into consideration as against such other person as well as against the person who made the confession."

The court may only take the confession into consideration against a coaccused. A confession by an accused person involving his co-accused when unsupported by other testimony, is evidence of the weakest kind against such co-accused. It is accomplice evidence needing corroboration, the need for corroboration being the greater when the maker of the statement has sought to retract it. *Anyuma Omolo and another v R* (1953) 20 EACA 218. Under section 32(1) of the Evidence Act, the evidential value of a confession by an accused person is that it can only be used as lending assurance to other evidence against the co-accused, evidence which narrowly falls short of the standard of proof for a conviction. It cannot be used as the basis of the prosecution case. *Gopa s/o Gidamebanya and others* (1953) 20 EACA 318; *Muthige s/o Mwigai and others* (1954) 21 EACA 267.

More recently we followed *Muthige s/o Mwigai* (*supra*) in *Joseph Odhiambo (1980)* Criminal Application No 14 of 1980 (Mombasa, unreported).

With respect, the learned judge took into consideration Ibrahim's confession making it the basis for Wilson's conviction in a background of non-existent prosecution evidence insofar as the deceased's actual murder by Wilson was concerned. It is right to exclude the evidence in the confession against this appellant. The conviction of the appellant Wilson Kinyua cannot be sustained. It is quashed and the sentence set aside.

We think that section 32(1) of the Evidence Act could be repealed profitably. A co-accused against whom a confession is taken into consideration has no opportunity of cross-examining when the maker does not give evidence or makes an unsworn statement in court. In England it is a fundamental rule of evidence that statements made by one defendant either to the police or to others (other than statements, whether in the presence or absence of a co-accused, made in the course and pursuance of a joint criminal enterprise to which the co-defendant was a party) are not evidence against a co-accused unless the co-accused either expressly or by implication adopts the statements and thereby makes them his own. *Rudd* (1948) 32 Criminal App R 138.

We now consider the appeal of Ibrahim M'Inanga. We have pointed out that the statement made by him to the police was admitted in evidence after a trial within a trial, the allegation being that Ibrahim was tortured by the police into making the confession. Mr Ole Kaparo and Mr Njugua who jointly argued these appeals on behalf of the appellants made the disturbing submission that the courts in Kenya accept as gospel truth whatever the police say in their evidence in court. We like counsel to give expression to their feelings of criticism connected with the administration of justice boldly and without fear. We are however glad to be able to say that what these two learned counsel said is not borne out by our experience. The courts of justice in Kenya do not have an amoral approach. Their approach is independent, just and impartial.

Ibrahim's statement was admitted in evidence after trial within a trial. The learned judge was entitled to do so after making his own assessment of the evidence which he did. Ibrahim repudiated the statement. In *Tuwamoi v Uganda* [1967] EA 84, the former Court of Appeal said that a trial court should accept with caution a confession which has been retracted or repudiated or both retracted and repudiated and must be fully satisfied that in all the circumstances of the case that the confession is true. The court further said, at p 91, 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. We said in *Ogero Omurwa* Criminal Appeal No 14 of 1979 (unreported) that if a statement is retracted, it should be an unfailing practice for the court to look for corroboration of the material particulars in the statement unless the court is able to come to the unhesitating conclusion that the confession is true.

The learned State Counsel properly conceded that in this case that the learned trial judge neither looked

for corroboration nor did he warn himself of the necessity of considering all the material points and circumstances that the confession could not but be true. We cannot say that had the learned judge done so he would have come to the same conclusion.

The conviction of the appellant Ibrahim M'Inanga is also quashed and the sentence set aside.

Dated and delivered at Nairobi this 10th day of November , 1980.

C.B MADAN

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JUDGE OF APPEAL

H.E MILLER

.....

JUDGE OF APPEAL

K.D POTTER

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR